TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 67

MORRIS MILLER, PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Proof of priority and general claim and proxy	1	1
Schedule "A"—Indenture of lease, January 17, 1928	7	5
Schedule "B"—Agreement of December 29, 1931	19	13
Amended proof of claim of Morris Miller	21	14
Objections of trustee	25	17
Notice of hearing	26	17
Notice of hearing	27	18
Minutes of hearing before the referee	28	19
Stipulation of facts	30	20
Affidavit submitted in support of claim	32	21
Exhibit—Indenture of lease, August 29, 1932	34	22
Exhibit—Indenture of lease, July 1, 1933	45	30
Order of referee, May 15, 1934	55	37
Decision of referee, May 9, 1934	57	38
Petition to review	58	38
Certificate of referee	60	39

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	Original	Print
Order appealed from	64	42
Opinion of Hulbert, J.	66	43
Notice of appeal	75	49
Petition for appeal	76	49
Order allowing appeal	77	50
Assignment of errors	78	50
Citation (omitted in printing)	80	
Stipulation as to record	81	52
Clerk's certificate (omitted in printing)	82	
Proceedings in U. S. C. C. A., Second Circuit	83	52
Opinion, per curiam	83	52
Decree	84	53
Clerk's certificate (omitted in printing)	86	
Order allowing certiorari	87	53

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy

In the Matter of SARNOFF-IRVING HAT STORES, INC., a Corporation, Bankrupt

PROOF OF PRIORITY AND GENERAL CLAIM AND PROXY

UNITED STATES OF AMERICA,
District of New Jersey,
State of New Jersey,
County of Essex, ss:

At the above District, in the County of Essex and State of New Jersey, on the date hereinafter set forth, came Morris Miller, who makes oath and says:

1. I am the claimant. My address is No. 211 Springfield Avenue, Newark, New Jersey.

2. The above bankrupt was, at and before the time of the filing of its petition of bankruptcy herein, and still is justly and duly indebted to me in the aggregate sum of Sixteen thousand six hundred twenty-five Dollars ($16,625.00), and the consideration for this debt is as follows:

3. On January 17th, 1928, I entered into an agreement of lease bearing the aforesaid date, with the above bankrupt, a true copy of which is annexed hereto and made a part hereof, and is marked Schedule "A."

[fol. 2] 4. Thereafter, on December 29th, 1931, the above named bankrupt and I entered into an agreement modifying the consideration called for under the terms of the aforesaid lease for a period beginning with November 1st, 1931, and ending July 31st, 1933, at a stated consideration of Three hundred Dollars ($300.00) per month, payable in advance on the first day of each and every month, which agreement, by its terms ratified, approved, confirmed and continued the aforesaid lease in all other respects in full force and effect, a copy of which agreement is attached hereto and made part hereof, and is marked Schedule "B."

5. On April 27th, 1932, the aforesaid bankrupt corporation was adjudged insolvent by the United States District Court for the Southern District of New York (H. McLachlan & Co., Inc., a corporation, Complainant, v. Sarnoff-Irving Hat Stores, Inc., Defendant, In Equity E-67-96), at which time the above named bankrupt was in possession of the premises mentioned and described in the aforesaid lease.

6. Thereafter, by further order of the United States District Court for the Southern District of New York, the Irving Trust Company and Max Sarnoff were appointed receivers in equity for the creditors and stockholders of the aforesaid bankrupt corporation, and as receivers entered into possession of the said premises, and remained there until June 1st, 1932, at which time they notified this claimant that they repudiated and disaffirmed all leases made by the above named bankrupt corporation, and affecting No. 203 Springfield Avenue, Newark, New Jersey, as of the date of their appointment, to wit, April 28th, 1932, with [fol. 3] the express provision that the said disaffirmance was in no wise to alter any arrangements that they as receivers might have entered into with this claimant, for the occupation by them of the said premises for the period of time that they continued the business of the above named bankrupt. As a result of the notice given, the receivers on behalf of the bankrupt corporation, breached the aforesaid lease before the within proceedings in bankruptcy were filed, to the damage of this claimant.

7. By reason of the foregoing, there was due and owing to this claimant as of June 1st, 1932, and there is due presently to this claimant, the following:

(a) Rent for the months of March and April, 1932, at the rate of $300.00 per month, in all amounting to the sum of $600.00

(b) The sum of $16,025.00, representing the difference between the rent reserved in said lease for a period beginning with May 1st, 1932, and ending July 31st, 1938, amounting to the sum of $32,000.00, and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and

the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	16,025.00
Total	$16,625.00

8. Claim for priority of payment is made for Six hun-
[fol. 4] dred Dollars ($600.00), as aforesaid, for all rental and other charges due under the said lease at the time of the appointment of the receivers in equity, for the reason that at the time of their appointmnt as such receivers, there were at the premises sufficient goods and chattels to satisfy a distress for the said moneys due and owing to this claimant at that time.

9. In pursuance of an order of the United States District Court, for the Southern District of New York, bearing date May 25th, 1932, and on or about June 24th, 1932, this claimant filed with the Irving Trust Company, receiver in equity of the above named bankrupt corporation, a proof of claim for Six hundred Dollars ($600.00), representing a priority claim for rent, as aforesaid, and for Sixteen thousand twenty-five Dollars ($16,025.00), representing damages sustained by reason of the disaffirmance and repudiation by the receivers of the said bankrupt corporation, of the lease made between this claimant and the said bankrupt corporation, which claim was accepted and filed, and no proceedings have heretofore been taken rejecting said claim.

10. No part of the aforesaid debt has been paid, and there are no set-offs or counterclaims against the sums claimed herein, no judgment has been rendered therefor or for any part thereof, nor has this claimant, nor any person for or on behalf of him, or to his knowledge and belief, had or received for his use any security for the said debt whatsoever, nor has any note or evidence of said debt been received.

Name: Morris Miller; Address: 211 Springfield Ave., Newark, N. J.

[fol. 5] Subscribed, sworn to and acknowledged before me this 21st day of September, 1932, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

Stern, a Master in Chancery of N. J.

Proxy

To S. Arthur Stern and Sidney Stein, Esquires, or their representatives:

The undersigned, of the City of Newark, County of Essex and State of New Jersey, a creditor of the above named bankrupt, does hereby authorize you and each of you to attend the meeting or meetings of creditors of the bankrupt, advertised or directed to be held at a Court of Bankruptcy, or at such other place and time as may be appointed by the Court for holding such meeting or meetings, or any adjournment or adjournments thereof that may be held, and then and there from time to time and as often as there may be occasion, for said creditor and in said creditor's name, to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy, and in the choice of trustee or trustees of the estate of said bankrupt, and to accept such appointment of trustees except that permission is hereby given to delegate the power of the selection of [fol. 6] a trustee or trustees to such person as you in your discretion may deem best, and with like powers to attend and vote at any meeting or meetings of creditors, or sitting or sittings of the Court which may be held therein, for any of the purposes aforesaid, also to accept any composition proposed by said bankrupt in satisfaction of said debt, and receive payment of dividends and money due said creditor under any composition or for the declaration of dividend, or for any other purpose in said creditor's interest whatsoever.

In witness whereof I have hereunto set my hand and seal this 21st day of September, 1932.

Morris Miller (L. S.)

Signed, sealed and delivered in the presence of Stern.

State of New Jersey,
County of Essex, ss:

Be it remembered, that on this 21st day of September, 1932, before me, a Master in Chancery of New Jersey, personally appeared Morris Miller, who I am satisfied is the person who executed the foregoing power of attorney, and I having made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered

the same as his voluntary act and deed for the uses and purposes therein expressed.

Stern, Master in Chancery of N. J.

[fol. 7] SCHEDULE A

Lease Annexed to Proof of Claim

This Indenture of Lease made this 17th day of January, 1928, between Morris Miller, of the City of Newark, County of Essex, and State of New Jersey, hereinafter referred to as the "landlord", and Sarnoff-Irving Hat Stores, Inc., hereinafter referred to as the "tenant,"

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves, and their respective heirs, executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant the store premises commonly known as 203 Springfield Avenue, Newark, New Jersey, together with a portion of the cellar underneath the same, which store is now in the course of construction, hereinafter referred to as the "premises," for the term beginning August 1, 1928 and ending July 31, 1938, at the annual rental of Forty-five Hundred ($4500) Dollars for the first two years of said term, at the annual rental of Five Thousand ($5,000) Dollars for the next three years of said term, and at the annual rental of Fifty-five Hundred ($5500) Dollars for the balance of said term. All of said rentals shall be payable in equal monthly installments in advance, on the first day of each and every month during said term.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

[fol. 8] (b) To procure, maintain and pay the premiums on plate glass insurance covering said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear,

against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be in such amount that the company shall be required to pay not in excess of $5,000.00 to any one person, and not in excess of $10,000.00 by reason of any one accident;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant will not, under penalty of forfeiture and damages:

1. Use or permit said premises to be used for any other purpose than for the purpose outlined in the rider attached hereto and made part hereof.

2. Assign this lease, nor re-let or underlet said premises or any part thereof.

3. Make any alterations to said premises.

[fol. 9] (c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, requirements and regulations, present and future, of any Federal, State, county and/or municipal authority, or agency or sub-division thereof having jurisdiction over or affecting said premises, with the exception of structural changes.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term, (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance, in existence at the execution hereof, and will not call upon the landlord, during the term of this lease, for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord.

(e) The landlord may enter upon said premises at reasonable hours on week days to examine the same, and may during the last six months of said term, exhibit the same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

(f) The tenant shall indemnify and save the landlord harmless from all fires, suits, proceedings, claims or actions of any kind arising out of, or in any wise connected with the use or occupation of said premises, and its appurtenants, or arising by reason of any breach or nonperformance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, other than [fol. 10] those providing for the payment of rent, for a period of ten days after written notice, the landlord may, at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon reenter the said premises as of its former estate. Any waiver by the landlord of any breach shall not be deemed or construed to be a waiver of any future breach.

(h) If the premises shall become vacant or abandoned during said term, or if tenant shall be dispossessed or removed from said premises, or if the term hereof shall end prior to the expiration date fixed herein because of any act of the tenant, or because of the happening of any contingency or event herein provided for, the tenant does hereby authorize the landlord, at its option, to reenter the same as agent of the tenant, or otherwise, to re-let the same, and to repair or remodel the same, if necessary or desirable for re-letting purposes, and receive and apply the rents so received to the payment of rents due hereunder, together with the costs of such repairing and remodeling. The tenant shall not be entitled to any sruplus accruing as a result of any re-letting, and shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for

the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the [fol. 11] same manner as if this lease had not been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or reentry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to absolve or discharge the tenant from liability hereunder.

(i) If at any time, during the term hereof, proceedings in bankruptcy shall be instituted by or against the tenant, resulting in its adjudication as a bankrupt, or if the tenant shall compound its debts, or assign its estate, or effects for payment thereof, or if any execution shall issue against the tenant, or its property on the premises, and a sale be had thereunder, or if a receiver or trustee shall be appointed of the tenant, or of its property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant personally, then and in any of said cases, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice shall be served by the landlord upon the tenant, or upon its assignee, receiver, and/or trustee, personally, or by registered mail addressed to the tenant, and/or assignee, receiver or trustee, at the demised premises. Thereupon, at the end of said ten day period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate, and all sums due hereunder, shall immediately become due and payable upon demand. This covenant and condition shall extend to and be binding upon any assignee or sub-lessee of the tenant, whose assignment [fol. 12] or sub-lease has been consented to by the landlord.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation hereby expressly disclaiming all right, title and interest therein, and

agrees that it shall have no claim for any damage or loss against the landlord by reason of such condemnation or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the condemnation, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing to him.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally or by mailing the same by registered mail addressed to the landlord at No. 79 Baldwin Avenue, Newark, New Jersey, and to the tenant at Paramount Theatre Building, Times Square, New York City.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condition in the premises, or in any part of the premises of which [fol. 13] the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact irrevocably, to execute and deliver any such instruments, in the event of its refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

(o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the State of New Jersey, it being expressly understood that the landlords' estate shall not be subject to such lability.

[fol. 14] (p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then in case

1. Such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as speedily as possible, and there shall be no abatement of rent;

2. Such damage should render untenantable the demised premises, in whole or in part, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. Of a total destruction of the premises, or of the building, of which the premises are a part, or if in case of fire, the landlord elects to rebuild irrespective of the extent of the damage, then this lease shall terminate ten days after the landlord shall serve written notice to that effect upon the tenant. The tenant shall pay all rent to the time of the fire, and if any rent has been paid in advance, or any security furnished, the landlord shall return any balance not owing to him.

(q) If the tenant should omit to make any payment, other than rent, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, shall be added to, and be deemed part of the next installment of rent following due thereafter.

5. The terms, covenants and conditions of the within lease shall be binding upon, and enure to the benefit of the parties [fol. 15] hereto, their respective heirs, executors, administrators, successors and assigns, as the case may be.

6. That the neuter gender when used herein and in the acknowledgment hereinafter set forth shall include all persons and corporations and words used in the singular shall

include words in the plural where the text of the instrument so requires.

Rider attached to and made part of lease entered into between Morris Miller and Sarnoff-Irving Hat Stores, Inc., affecting premises 203 Springfield Avenue, Newark, N. J., dated January 17th, 1928.

7. Unless the landlord consents thereto in writing, the tenant will not, under penalty of forfeiture and damages, use or permit said premises to be used for any other purpose than for the sale of hats and caps and men's and boys' furnishings. The tenant shall not, however, be permitted to sell in said premises men's or boys' clothing, including overcoats, suits, vests, trousers and other similar men's and boys' wearing apparel.

8. As long as this lease is in effect, the landlord agrees not to rent any other store in said building commonly known as Nos. 203-213 Springfield Avenue, Newark, N. J., for use as a men's and boys' hat and cap shop. Nothing herein contained, however, shall be so construed as to prohibit the landlord from renting any store in said building for the sale of men's furnishings, provided that men's and boys' hats and caps are not sold as part of such men's furnishings.

9. The landlord agrees to install a new store front in said demised premises at his own expense substantially in ac-
[fol. 16] cordance with the sketch attached hereto and made part hereof.

10. The tenant agrees that it will not erect or maintain on said demised premises any sign or other advertising matter, unless it first obtains the landlord's consent and approval thereof.

11. The tenant represents to the landlord that the execution of the within lease was not effected through the medium of any broker knowing that the landlord relied upon the truth of the within representation in executing the within instrument.

13. The landlord agrees to furnish the tenant without any additional rent, reasonable heat for said demised premises from the first day of October to the first day of April in each year. It is understood, however, that the landlord is

not to be responsible in damages to the tenant for failure to furnish such heat, provided his failure so to do is caused by matters not reasonably within his control.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers.

Morris Miller. (L. S.) Sarnoff-Irving Hat Stores, Inc., by Simon Sarnoff, President.

Signed, sealed and delivered in the presence of—
Attested: S. L. Ruzon, Secretary. (Seal.)

[fol. 17] Acknowledgments

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 17th day of January, one thousand nine hundred and twenty-eight, before me, the subscriber, a notary public of New York, personally appeared S. L. Ruzon, known to me to be the Secretary of the Sarnoff-Irving Hat Stores, Inc., the Corporation within named, who, being by me duly sworn on his oath, said and made proof to my satisfaction that he is such Secretary, and that he well knows the Common Seal of said Corporation, and that the Seal affixed to the within lease is such Common Seal and was thereto affixed by the President of said Corporation, and that the said lease was by the Simon Sarnoff, President, also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said deponent, who thereupon subscribed his name thereto as attesting witness.

Sworn and subscribed before me, this 17th day of January, 1928.

Mildred Gold, Notary Public of New York. County Clerk's Certificate attached.

[fol. 18] STATE OF NEW JERSEY,
County of Essex, ss:

Be it remembered that on this 24th day of January, one thousand nine hundred and twenty-eight, before me, the subscriber, a notary of New Jersey, personally appeared Morris Miller who, I am satisfied, is one of the parties men-

tioned in the within lease, and to whom I first made known the contents thereof, and thereupon I acknowledged that Morris Miller signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed: And the said Morris Miller being by me privately examined, separate and apart from husband, acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, freely without any fear, threats or compulsion of wife's said husband.

Henry Siegel, Notary Public of New Jersey.

[fol. 19] SCHEDULE "B"

Agreement Annexed to Proof of Claim

Memorandum of Agreement made this 29th day of December, 1931, between Morris Miller, of the City of Newark, Essex County, New Jersey, hereafter referred to as the party of the first part; and Sarnoff-Irving Hat Stores, Inc., a corporation, hereafter referred to as the party of the second part, witnesseth:

Whereas, the parties hereto did enter into a certain agreement of lease covering store premises commonly known as #203 Springfield Avenue, Newark, N. J., together with a portion of the cellar underneath the same, for the term beginning August 1st, 1928, and ending July 31st, 1938; and

Whereas, the rental under the terms of the aforesaid lease as incorporated therein, is to the following effect:

$4,500.00 for the first two years of the said term (August 1st, 1928, to July 31st, 1930);

$5,000.00 for the next three years of said term (August 1st, 1930, to July 31st, 1933);

$5,500.00 for the balance of said term (August 1st, 1933, to July 31st, 1938); and

Whereas, the parties hereto are desirous of modifying such portions of paragraph one of the said lease, hereinabove more particularly recited, without modifying any [fol. 20] other terms, covenants and conditions thereof, for a period beginning November 1st, 1931, and ending July 31st, 1933;

Now, therefore, this indenture witnesseth:

In consideration of the sum of One Dollar, each to the other in hand paid and of the mutual covenants and conditions hereto contained, the parties do agree as follows:

1. That the rental called for under the terms of the aforesaid lease for the period beginning November 1st, 1931, and ending July 1st, 1933, shall be Three Hundred ($300.00) per month, payable in advance on the first day of each and every month.

2. That except as herein modified, the aforesaid lease is ratified, approved, confirmed and continued in full force and effect.

In witness whereof the party of the first part has hereunto set his hand and seal and the party of the second part has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the day and year first above written.

Signed, sealed and delivered in the presence of—
(Signed) Morris Miller, L. S. Sarnoff-Irving Hat Stores, Inc., by (Signed) Simon Sarnoff, President.
Attest: (Signed) S. L. Ruzon, Secretary.

[fol. 21] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

H. McLACHLAN & Co., INC., Complainant,
and
SARNOFF-IRVING HAT STORES, INC., Defendant

AMENDED PROOF OF CLAIM OF MORRIS MILLER

Priority and General Claim

STATE OF NEW JERSEY,
County of Essex, ss:

Morris Miller, being duly sworn on his oath according to law, deposes and says:

1. This deponent is the landlord mentioned in a certain indenture of lease dated January 17th, 1928, made between him and Sarnoff-Irving Hat Stores, Inc., a corporation, a

true copy of which is annexed hereto and marked Schedule "A."

2. Thereafter, and on December 29th, 1931, Morris Miller and Sarnoff-Irving Hat Stores, Inc., a corporation, entered into an agreement modifying the consideration called for under the terms of the aforesaid lease, for a period beginning November 1st, 1931, and ending July 31st, 1933, at a stated consideration of $300 per month, payable in advance on the first day of each and every month, and did by [fol. 22] the aforesaid memorandum ratify, approve, confirm and continue the aforesaid lease in all other respects in full force and effect, copy of which agreement is attached hereto and made part hereof and marked Schedule "B."

3. Deponent is advised that the defendant was adjudicated insolvent by the United States District Court, Southern District of New York, by order of that Court bearing date April 27th, 1932, and that at the time of the appointment of the receivers by said Court, Sarnoff-Irving Hat Stores, Inc., was in possession of the premises mentioned and described in the aforesaid lease.

4. Thereafter, Max Sarnoff and Irving Trust Company, a corporation, receivers appointed for the Sarnoff-Irving Hat Stores, Inc., entered into possession of the premises, and remained there until June 1st, 1932, at which time it notified this deponent that they had disaffirmed all leases and agreements made between the Sarnoff-Irving Hat Stores, Inc., and affecting premises 211 Springfield Avenue, Newark, New Jersey, as of the date of their appointment April 28th, 1932, with the provision, however, that the said disaffirmance in nowise was to alter any arrangement that they, as receivers, might have entered into with this deponent for the period of time during which they were to continue with the business of Sarnoff-Irving Hat Stores, Inc.

5. That by reason of the foregoing, there is due and owing to this deponent, under his said lease the following:

[fol. 23] (a) Rent for the month of March and April, 1932, at the rate of $300 per month, amounting in all to $600.00 ... $ 600.00

(b) The sum of $16,025.00 representing the difference between the rent reserved in the said lease for a period beginning May 1st, 1932 and ending July 31st, 1938, amounting to the sum of $32,000.00 and the fair annual rental of said premises to-wit, the sum of $2,400.00 per year for a period of 3 years, and the further sum of $2,700.00 per year for a period of 3 years and 3 months, being the balance of said term as called for under said lease 16,025.00

6. Deponent is advised and verily believes that the assets of the defendant corporation are more than sufficient to pay its liabilities.

7. Claim for priority of payment is made for all rental and other charges due under said lease at the time of the appointment of the receivers, amounting to $600.00 as aforesaid, for the reason that at the time of the appointment of the receivers sufficient goods and chattels of the said defendant corporation were located on the said premises to satisfy a distress for the said moneys due and owing at that time.

[fol. 24] 8. No part of the aforesaid debt has been paid, and there are no setoffs or counterclaims against the sums claimed herein, and no note has been received, and no judgment has been rendered; and this deponent has not, nor has any person by his knowledge or order or for his use, have or receive any manner or security for said debt whatsoever.

Morris Miller.

Sworn to and subscribed before me this 24th day of June, A. D. 1932.

Stern, Master in Chancery of New Jersey.

Annexed to this Amended Proof of Claim are Schedules "A" and "B", being the Lease dated January 17, 1928 and the Agreement dated December 29, 1931, appearing hereinabove as Schedules "A" and "B" annexed to the original Proof of Claim.

[fol. 25] In United States District Court, Southern District of New York

[Title omitted]

Objections of Trustee

To Hon. Oscar W. Ehrhorn, Referee in Bankruptcy:

Irving Trust Company, Trustee in Bankruptcy herein, does hereby object to the duplicate claims filed herein by Morris Miller, each in the sum of $16,625.00, upon the ground that the indebtedness of the bankrupt to the said claimant is but the sum of $1,000.00.

The Trustee in Bankruptcy therefore prays that an order be entered consolidating said claims, and reducing the same to the sum of $1,000.00.

Dated, New York, April 27th, 1933.

McManus, Ernst & Ernst, Attorneys for Trustee, Office and P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

[fol. 26] In United States District Court, Southern District of New York

[Title omitted]

Notice of Hearing—September 27, 1933

To Stein & Stern, Esqs., Attorneys for Morris Miller, 17 Academy Street, Newark, New Jersey:

Please take notice that Irving Trust Company, trustee in Bankruptcy herein, has duly objected to the duplicate

claims filed herein by Morris Miller, each in the sum of $16,025.00, upon the ground that the indebtedness of the bankrupt to the said claimant is but the sum of $1,000.00.

Please take further notice that a hearing will be had on the 17th day of October, 1933, at 10:30 A. M, or as soon thereafter as counsel can be heard, before Oscar W. Ehrhorn, Esq., Referee in Bankruptcy, at his office, No. 280 Broadway, Borough of Manhattan, City, County and State of New York, upon the said objections to the claim of Morris Miller, and that at that time the undersigned will move for an order consolidating said claims and reducing and al-
[fol. 27] lowing the same as a general claim herein in the sum of $1,000.00.

Dated, New York, September 27th, 1933.

Yours, etc., McManus, Ernst & Ernst, Attorneys for Irving Trust Company, Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF HEARING—March 16, 1934

To Stroock & Stroock, Esqs., Attorneys for Morris Miller, 141 Broadway, New York City:

Please take notice that a hearing will be had before Hon.
[fol. 28] Oscar W. Ehrhorn, Referee in Bankruptcy, at his office, 280 Broadway, Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 27th day of March, 1934, at 12:00 o'clock noon of said day, on the objections filed by Irving Trust Company, as Trustee in Bankruptcy herein, to the duplicate claims filed herein by Morris Miller, each in the sum of $16,625.00.

Please take further notice that the undersigned will move the Court at that time for an order consolidating the said

claims of Morris Miller, and reducing the same to the sum of $600.00 as a general claim herein.

Dated, New York, March 16th, 1934.

Yours, etc., McManus, Ernst & Ernst, Attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

MINUTES OF HEARING BEFORE THE REFEREE

Mr. Melzer: Next is the claim of Morris Miller. This claim was filed in the sum of $16,025. There are two objections to this claim. I assert that the only amount due the claimant at the time of the filing of the petition is the sum of $600.00, and I ask that the claim be reduced to that amount.

[fol. 29] The balance would accrue subsequent to the filing of the petition.

The Referee: Was there any breach before?

Mr. Melzer: There was a breach before the filing of the petition. There was a breach of the lease upon the filing of the Equity Petition and a reentry by the landlord prior to the filing of the petition, and in that regard it does come within the Circuit Court of Appeals case, but the opinion in that Circuit Court of Appeals case specifically says that besides the breach, besides the right of action, the lease must provide that they can sue at that time for the difference between the reasonable re-rental value and the rental reserved in the lease, and Judge Hand says that if it does not contain such a provision then it would not be provable. This lease does not contain that clause, and therefore it is not provable.

The Referee: Do you want to submit a memorandum?

Mr. Steefel: Yes. We have agreed on a stipulated set of facts which I should like to have marked as an exhibit.

Mr. Melzer: I submit a stipulation of the facts, to be marked as an exhibit, and, for the purpose of determining the questions of law, I will concede that those facts are true. In the event of your holding that the claim is provable, we will then come back and liquidate the claim.

Mr. Steefel: For the purpose of the record I move that our claim be liquidated and that testimony be taken to liquidate our claim.

(Stipulation received and marked Claimant's Exhibit A, April 5, 1934.)

The Referee: All papers in in one week. I will reserve decision.

[fol. 30] In United States District Court, Southern District of New York

[Title omitted]

Stipulation of Facts

It is hereby stipulated and agreed by and between the attorneys for Irving Trust Company, as Trustee in Bankruptcy of the above named bankrupt, and the attorneys for Morris Miller, claimant herein, that for and only for the purposes of the within action, the following facts are stipulated and agreed:

1. On January 17th, 1928, the claimant, Morris Miller, and the bankrupt entered into an agreement of lease, a true copy of which is annexed to the claimant's proof of claim herein.

2. Thereafter, and on December 29th, 1931, the bankrupt and the claimant entered into an agreement modifying said lease. A true copy of said modification agreement is annexed to the claimant's proof of claim.

3. On or about the 27th day of April, 1932, action was instituted in the United States District Court for the South-
[fol. 31] ern District of New York, entitled "H. McLachlan & Co., Complainant, against Sarnoff-Irving Hat Stores, Inc., Defendant," in which action and at which time, by order of said United States District Court, Irving Trust Company and Max Sarnoff were appointed Receivers in Equity for the creditors and stockholders of said company. Max Sarnoff subsequently resigned as co-receiver in Equity, and Irving Trust Company continued to act as sole Receiver in Equity, and as such Receiver remained in possession of the said premises until July 18th, 1932.

4. Irving Trust Company, as Receiver in Equity of Sarnoff-Irving Hat Stores, Inc., duly notified the claimant of its disaffirmance of the said lease on June 1st, 1932.

5. Irving Trust Company, as Receiver, vacated possession of the said premises on July 18th, 1932, and notified the claimant thereof.

6. The claimant reentered the said premises and took possession thereof on or about the 25th day of July, 1932, pursuant to the terms of the said lease.

7. Sarnoff-Irving Hat Stores, Inc., the bankrupt herein, filed a voluntary petition in bankruptcy on the 27th day of August, 1932.

Dated, New York, April 3rd, 1934.

McManus, Ernst & Ernst, Attorneys for Irving Trust Company, Trustee in Bankruptcy. Stroock & Stroock, Attorneys for Claimant.

[fol. 32] The following affidavit was not before the Referee in Bankruptcy, and the Trustee in Bankruptcy consented to the submission of this affidavit to the District Court upon the hearing on the petition to review upon the understanding that it would be considered only in connection with the question as to whether the facts gave rise to a provable claim in bankruptcy and not for the purpose of determining the amount of the claim.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT SUBMITTED IN SUPPORT OF CLAIM

STATE OF NEW JERSEY,
County of Essex, ss:

Morris Miller, being duly sworn on his oath according to law, deposes and says:

1. Deponent is the owner of premises 203 Sprin-field Avenue, Newark, New Jersey, which premises were formerly leased to the above named bankrupt.

[fol. 33] 2. On August 29, 1932, deponent entered into an agreement of lease with Israel Wachsman, a copy of which lease is appended hereto and made part hereof. Rents in accordance with the terms of the lease were paid by Mr. Wachsman to July 1, 1933, at which time said lease by agreement was abandoned.

3. On July 1, 1933, this deponent entered into a lease with Moris Miller & Sons, a corporation, a copy of which lease is appended hereto and made part hereof. Rent in accordance with the terms of said lease has been paid, and said lease is now in full force and effect.

4. Deponent states that the lease made with Moris Miller & Sons, a corporation, is in truth a verity and a genuine lease, said Moris Miller & Sons, a corporation, being a tenant of another store in the premises of this deponent at an annual rental of Seventy-five hundred Dollars ($7500.00), and latter lease is also in full force and effect.

5. The capital stock issued and outstanding of Moris Miller & Sons, a corporation, is 420 shares, and the same is divided between this deponent, who holds 220 shares, Harry Miller, who holds 100 shares, and Martin Miller who holds ~~100~~ shares. The net worth of Moris Miller & Sons is approximately Seventy thousand Dollars ($70,000.00).

Moris Miller.

Sworn and subscribed to before me this 18th day of December, 1934.

Louis Stein, a Notary Public of N. J.

[fol. 34] EXHIBIT TO AFFIDAVIT

Lease

This indenture of lease made this 29th day of August, 1932, between Morris Miller, hereinafter referred to as the "landlord", and Israel Wachsman, hereinafter referred to as the "tenant."

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves,

and their respective executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant premises No. 203 Springfield Avenue, Newark, New Jersey, together with storage space in the cellar directly under the aforesaid premises, together with the use, during the term hereof and any renewal hereof, of the chattels and fixtures now contained in the said store, hereinafter referred to as the "premises", for the term beginning September 1, 1932, and ending August 31, 1933, at the annual rental of Eighteen Hundred Dollars ($1800.00), with an option to renew, subject to the conditions hereinafter set forth, for a term beginning September 1, 1933, and ending August 31, 1934, at the annual rental of Twenty-four Hundred Dollars ($2400.00); together with a further option to renew for a third year, subject to the conditions hereinafter set forth, for a term beginning September 1, 1934, and ending August 31, 1935, at the annual rental of $3,000.00. All of said rentals shall be payable in equal monthly installments in advance, on the first day of each and every month during said term, excepting that rent [fol. 35] for the first month shall be paid upon the execution hereof.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

(b) To procure, maintain and pay the premiums on plate glass insurance covering the plate glass in said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear, against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be carried by companies of adequate financial responsibility and shall be in such form that the company shall be obligated to pay by reason of injury and/or damages to any one person, a sum not in excess of $10,000.00, and sums aggregating not more than $20,000.00 by reason of any one happening;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant, under penalty of forfeiture and damages:

[fol. 36] 1. Will not use or permit said premises to be used for any other purpose than for the repairing, remodelling and manufacturing and sale of men's hats and caps, the landlord agreeing not to engage in a similar business in that portion of the building of which these premises are a part and which he presently occupies.

2. Will not assign this lease, nor re-let or underlet said premises, or any part thereof, except that permission is hereby granted to the tenant to assign this lease to any one or more members of his family, or to any corporation in which he and/or the member of his family shall be the sole stockholders and parties interested; provided, that under no circumstances shall the permission to make the within assignment, as aforesaid, relieve the tenant of his obligation to conform strictly with all the terms, covenants and conditions referred to in said lease, and the tenant agrees that in the event an assignment of the within lease is made, as aforesaid, his obligation for the prompt payment and performance of all the rents, terms, covenants and conditions referred to herein and required to be paid and performed, shall be strictly complied with, waiving all notice of default, and consenting that any extensions of time and changes in the matter of payment or performance of any of the terms and conditions of the said lease may be given by the landlord to any person or persons, firm or firms, to whom this lease may be assigned in the manner aforesaid, without any notice to the tenant, [fol. 37] and without affecting his liability hereunder.

3. Will not make any alterations to said premises.

(c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, require-

ments and regulations, present and future, of any Federal, State, county and/or municipal authority, or agency or subdivision thereof having jurisdiction over or affecting said premises, including the lands appurtenant thereto.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance in existence at the execution hereof, and will not call upon the landlord, during the term of this lease, for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord, in as good condition as said premises were at the commencement of said term, reasonable wear and tear and damages by the elements excepted.

(e) The landlord may enter upon said premises at reasonable business hours on week days to examine the same, and may during the last six months of said term, exhibit the same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

[fol. 38] (f) The tenant shall indemnify and save the landlord harmless from all fines, suits, proceedings, claims and/or actions of any kind arising out of and/or in any wise connected with the use or occupation of said premises, and its appurtenances, or arising by reason of any breach or non-performance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, for a period of twenty days after written notice, the landlord may at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon re-enter the said premises as of its former estate; provided, however, that the landlord may institute dispossess proceedings for the non-payment of any rent due hereunder, without the necessity of such notice; and provided further that if the breach or violation by the tenant

relates to any covenant other than the payment of rent, then the landlord shall not be entitled to elect to terminate this lease unless the tenant fails, within said period, to begin to remedy the breach or violation complained of, and thereafter fails to diligently complete the remedying thereof; and provided further, that if the breach or violation complained of shall be the result of any action taken under any statute, ordinance, rule or requirement of any governmental body, then, if the tenant shall institute and prosecute diligently any bona fide action to establish the invalidity thereof, the period of twenty days shall be suspended until the final termination of such proceedings. [fol. 39] Any waiver by the landlord of any breach shall not be deemed a waiver of any similar or other further breach. The rights and privileges herein reserved shall be in addition to the remedy afforded to the landlord in the courts of law and equity.

(h) If at any time, during the term hereof, proceedings in bankruptcy or in equity shall be instituted by or against the tenant, and/or by or against any assignee or sub-lessee to whose assignment or sub-lease the landlord has consented, resulting in its adjudication as a bankrupt, or as an insolvent corporation; and/or if the tenant or said assignee or sub-tenant shall compound its debts or assign its estate or effects for payment thereof; and/or if any execution shall issue against the tenant or said assignee or subtenant or its property on the premises, and a sale be had thereunder; and/or if a receiver or trustee shall be appointed of the tenant or its assignee or sublessee, or of its or their property, and said appointment is not vacated within twenty days after such appointment; and/or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant or said assignee or sub-tenant personally, then and in any of said contingencies, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice to that effect shall be served by the landlord upon the tenant or its assignee, or sub-lessee, or receiver or trustee, at the demised premises. Thereupon, at the end of said ten day period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate.

[fol. 40] (i) If the premises shall become abandoned during said term, and/or if the tenant shall be dispossessed or removed from said premises, and/or if the term hereof shall end prior to the expiration date fixed herein because of any act or omission of the tenant, and/or because of the happening of any contingency or event herein provided for, and/or because of the election of the landlord pursuant to the terms hereof, the tenant does hereby authorize the landlord, at its option, to re-enter the same as agent of the tenant, or for its own account, or otherwise, to re-let the same, and to repair or remodel the same if necessary or desirable for re-letting purposes, and to receive and apply the rents so received to the payment of the rents due hereunder, together with the cost of such repairing, remodeling and/or re-letting. The tenant shall not be entitled to any surplus accruing as a result of any re-letting, but shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the same manner as if this lease had not been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or re-entry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to absolve or [fol. 41] discharge the tenant from liability hereunder.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation, eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation, hereby expressly disclaiming all right, title and interest therein, and agrees that it shall have no claim for any damages or loss against the landlord by reason of such condemnation

or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the passing of title, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally, or by mailing the same by registered mail addressed to the landlord at 211 Springfield Avenue, Newark, New Jersey, and to the tenant at 203 Springfield Avenue, Newark, New Jersey.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condi-
[fol. 42] tion in the premises, or in any part of the premises of which the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000.00) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact, irrevocably, to execute and deliver any such instruments, in the event of its failure or refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

(o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the

State of New Jersey, it being expressly understood that [fol. 43] the landlord's estate shall not be subject to such liability.

(p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then

1. In case such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as speedly as possible, and there shall be no abatement of rent; but if

2. Such damage should render the demised premises untenantable in whole or in part, without causing a total destruction thereof, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire until such repairs have been substantially completed, of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. In case of a total destruction of the premises, or of the building, of which the premises are a part, then this lease shall terminate ten days after either party shall serve written notice to that effect upon the other, at which time the tenant's right to possession shall cease and come to an end. The tenant shall pay all rent to the date of the fire, and if any rent has been paid in advance, or any security furnished, the landlord shall return any balance not owing.

[fol. 44] (q) If the tenant should omit to make any payment, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, together with interest, shall be added to, and be deemed part of the next installment of rent falling due thereafter.

5. The terms, covenants and conditions of the within lease shall be binding upon and enure to the benefit of each of the parties hereto, their respective executors, administrators, successors and assigns, as the case may be.

6. The neuter gender, when used herein and in the acknowledgment hereafter set forth, shall include all persons and corporations, and words used in the singular shall in-

clude words in the plural where the text of the instrument so requires.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers, and their corporate seal to be hereto affixed.

Morris Miller (L. S.) Israel Wachsman (L. S.)

Signed, sealed and delivered in the presence of Harry Wische.

[fol. 45] EXHIBIT TO AFFIDAVIT

Lease

This Indenture of Lease, made this 1st day of July, 1933, between Moris Miller, hereinafter referred to as the "landlord," and Moris Miller & Sons, a corporation, hereinafter referred to as the "tenant,"

Witnesseth: In consideration of the promises, covenants and agreements herein entered into between the parties, the parties do agree to and with each other, for themselves, and their respective executors, administrators, successors and assigns, as follows:

1. The landlord does hereby demise and lease unto the tenant premises No. 203 Springfield Avenue, Newark, New Jersey, together with storage space in the cellar directly under the aforesaid premises, together with the use, during the term hereof and any renewal hereof of the chattels and fixtures now contained in the said store, hereinafter referred to as the "premises", for the term beginning July 1, 1933 and ending June 30, 1938, at the annual rental of Twelve Hundred Dollars ($1200.00), it being expressly understood that the tenant shall not pay any rent for said premises until January 1, 1934. The parties agree that the tenant shall have the right to cancel lease, upon giving to the landlord sixty days of its intension so to do. All of said rents shall be payable in equal monthly installments in advance, on the first day of each and every month during said term, excepting that rent for the first month shall be paid upon the execution hereof.

2. In addition to the foregoing rental, and as part of the total rent to be paid by the tenant to the landlord, the tenant agrees:

[fol. 46] (b) To procure, maintain and pay the premiums on plate glass insurance covering the plate glass in said premises;

(c) To procure, maintain and pay the premiums for public liability insurance, insuring and indemnifying the landlord and tenant, as their respective interests may appear, against any loss or damage that may be incurred by any person, or the property of any person, by reason of any use of said premises, which insurance shall be carried by companies of adequate financial responsibility and shall be in such form that the company shall be obligated to pay by reason of injury and/or damages to any one person, a sum not in excess of $10,000.00, and sums aggregating not more than $20,000.00 by reason of any one happening;

(d) The aforesaid items of additional rent shall be payable on the first of the month next succeeding the incurring of the indebtedness therefor.

3. This lease is made upon the following covenants and conditions, each of which the respective parties hereto agree to observe and perform:

(a) The tenant shall pay said several rentals punctually.

(b) Unless the landlord consents thereto in writing, the tenant, under penalty of forfeiture and damages:

1. Will not use or permit said premises to be used for [fol. 47] any other purpose than for the sale of men's hats, caps, shoes and haberdashery.

2. Will not assign this lease, nor re-let or underlet said premises, or any part thereof.

3. Will not make any alterations to said premises.

(c) The tenant will, at its own cost, promptly comply with and perform all statutes, ordinances, orders, requirements and regulations, present and future, of any Federal, State, county and/or Municipal authority, or agency or subdivision thereof having jurisdiction over or affecting said premises, including the lands appurtenant thereto.

(d) The tenant, at its own cost, will keep the premises in good, safe and proper repair, and tenantable condition during the term (wear and tear arising from a reasonable use of the same, and damages by the elements excepted); and will not suffer any act of commission or omission which will increase the rate of insurance in existence at the execution hereof, and will not call upon the landlord, during the term of this lease for the making of any repairs whatsoever. At the expiration of said term, the tenant shall yield up possession thereof to the landlord, in as good condition as said premises were at the commencement of said term, reasonable wear and tear and damages by the elements excepted.

(e) The landlord may enter upon said premises at reasonable business hours on week days to examine the same, and may during the last six months of said term, exhibit the [fol. 48] same to any person or persons, and during said time may also maintain "To Let" and "For Sale" notices on the outside walls thereof.

(f) The tenant shall indemnify and save the landlord harmless from all fines, suits, proceedings, claims and/or actions of any kind arising out of and/or in any wise connected with the use or occupation of said premises, and its appurtenances, or arising by reason of any breach or nonperformance of any covenant or condition hereof.

(g) Upon any breach or violation by the tenant of any of the terms, covenants or conditions of this lease, for a period of twenty days after written notice, the landlord may at its election, terminate this lease, and upon such election, this lease, and all the estate of the tenant in said premises, shall come to an end, and the landlord may thereupon re-enter the said premises as of its former estate; provided, however, that the landlord may institute dispossess proceedings for the non-payment of any rent due hereunder, without the necessity of such notice; and provided further that if the breach or violation by the tenant relates to any covenant other than the payment of rent, then the landlord shall not be entitled to elect to terminate this lease unless the tenant fails, within said period, to begin to remedy the breach or violation complained of, and thereafter fails to diligently complete the remedy thereof; and provided further, that if the breach or violation complained

of shall be the result of any action taken under any statute, ordinance, rule or requirement of any governmental body, then, if the tenant shall institute and prosecute diligently [fol. 49] any bona fide action to establish the invalidity thereof, the period of twenty days shall be suspended until the final termination of such proceedings. Any waiver by the landlord of any breach shall not be deemed a waiver of any similar or other further breach. The rights and privileges herein reserved shall be in addition to the remedy afforded to the landlord in the courts of law and equity.

(h) If at any time, during the term hereof, proceedings in bankruptcy or in equity shall be instituted by or against the tenant, and/or by or against any assignee or sub-lease to whose assignment or sub-lease the landlord has consented, resulting in its adjudication as a bankrupt, or as an insolvent corporation; and/or if the tenant or said assignee or sub-tenant shall compound its debts or assign its estate or effects for payment thereof; and/or if any execution shall issue against the tenant or said assignee or sub-tenant or its property on the premises, and a sale be had thereunder; and/or if a receiver or trustee shall be appointed of the tenant or its assignee or sub-lessee, or of its or their property, and said appointment is not vacated within twenty days after such appointment; and/or if this lease shall by operation of law devolve upon or pass to any person or persons other than the tenant or said assignee or sub-tenant personally, then and in any of said contingencies, this lease shall, at the option of the landlord, cease and come to an end, ten days after written notice to that effect shall be served by the landlord upon the tenant or its assignee, or sub-lessee, or receiver or trustee, at the demised premises. Thereupon, at the end of said ten day [fol. 50] period, the landlord shall immediately become entitled to repossess said premises, and re-enter the same as of its former estate.

(i) If the premises shall become abandoned during said term, and/or if the tenant shall be dispossessed or removed from said premises, and/or if the term hereof shall end prior to the expiration date fixed herein because of any act or omission of the tenant, and/or because of the happening of any contingency or event herein provided for, and/or because of the election of the landlord pursuant to the terms hereof, the tenant does hereby authorize the landlord, at

its option, to re-enter the same as agent of the tenant, or for its own account, or otherwise, to re-let the same, and to repair or remodel the same if necessary or desirable for re-letting purposes, and to receive and apply the rents so received to the payment of the rents due hereunder, together with the costs of such repairing, remodeling and/or re-letting. The tenant shall not be entitled to any surplus accruing as a result of any re-letting, but shall remain liable for any deficiency, which deficiency shall, at the option of the landlord, become payable on demand, or become payable as it accrues from month to month. The tenant further agrees, that notwithstanding any entry or re-entry by the landlord, whether by summary proceedings, termination or otherwise, it will pay and be liable for, on the days originally fixed herein for the payment thereof, amounts equal to the several installments of rent and other charges reserved herein, in the same manner as if this lease had not [fol. 51] been terminated, and/or in the same manner, as if the landlord had not entered or re-entered as aforesaid. No entry or re-entry by the landlord, whether had or taken under what are known generally as summary proceedings, or otherwise, shall be deemed to, absolve or discharge the tenant from liability hereunder.

(j) In the event that the demised premises, or any part thereof, shall be taken for public or quasi-public use, by any power or authority, having the right to take the same by condemnation, eminent domain, or otherwise, the amount awarded for compensation for the whole or part of the demised premises so taken, shall be paid to the landlord, and the tenant hereby expressly grants unto the landlord the entire amount of said award or compensation, hereby expressly disclaiming all right, title and interest therein, and agrees that it shall have no claim for any damages or loss against the landlord by reason of such condemnation or taking. This lease shall come to an end as of the date title shall vest in the taking body, and the landlord and tenant shall thereupon be released of and from all obligations and liability to each other accruing hereunder thereafter. The tenant shall pay all rent accrued up to the time of the passing of title, and if any rent has been paid in advance, or any security been furnished, the landlord shall return any balance not owing.

(k) Until otherwise agreed, any notice provided for by this lease may be served either personally, or by mailing the same by registered mail addressed to the landlord at 211 [fol. 52] Springfield Avenue, Newark, New Jersey, and to the tenant at 203 Springfield Avenue, Newark, New Jersey.

(l) The landlord shall not be liable to the tenant for any damages sustained by it due to defects or change in condition in the premises, or in any part of the premises of which the demised premises are a part, nor to any person, nor to any goods or things of any person, by reason of any cause whatsoever, relating or occurring in the demised premises, or in any other portion of the building of which the demised premises are a part.

(m) This lease shall be subject and subordinate at all times to the lien of any mortgages now encumbering, or which may hereafter be placed upon the lands and premises, of which the demised premises are a part, provided the total amount of mortgage encumbrances shall not exceed Three Hundred Thousand ($300,000.00) Dollars. The tenant covenants and agrees to duly execute, acknowledge and deliver upon demand, such further instrument or instruments as shall be required by the landlord and/or any mortgagee for the purpose of carrying this clause into effect, and the tenant hereby appoints the landlord its attorney-in-fact, irrevocably, to execute and deliver any such instruments, in the event of its failure or refusal so to do.

(n) The landlord covenants that upon the tenant paying the rentals and performing the covenants aforesaid, the tenant shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid.

[fol. 53] (o) Nothing herein contained shall be construed as a consent on the part of the landlord to subject the estate of the landlord to liability under the Mechanic's Lien Law of the State of New Jersey, it being expressly understood that the landlord's estate shall not be subject to such liability.

(p) In case the demised premises, or any part thereof, shall be damaged by fire, without any fault on the part of the tenant, then

1. In case such damage should be so slight as not to interfere substantially with the use by the tenant of the demised premises, the landlord shall repair the damage as

speedily as possible, and there shall be no abatement of rent; but if

2. Such damage should render the demised premises untenable in whole or in part, without causing a total destruction thereof, the landlord shall repair the same as speedily as possible, and there shall be an abatement from the date of the fire until such repairs have been substantially completed, of so much of the rent as the rental value of the untenantable portion of the premises shall fairly bear to the rent of the entire demised premises.

3. In case of a total destruction of the premises, or of the building, of which the premises are a part, then this lease shall terminate ten days after either party shall serve written notice to that effect upon the other, at which time the tenant's right to possession shall cease and come to an end. The tenant shall pay all rent to the date of the fire, and if any rent has been paid in advance, or any security [fol. 54] furnished, the landlord shall return any balance not owing.

(q) If the tenant should omit to make any payment, which the tenant is obliged to make hereunder, the landlord may make or pay the same, and the amount or cost thereof, together with interest, shall be added to, and be deemed part of the next installment of rent falling due thereafter.

4. The terms, covenants and conditions of the within lease shall be binding upon, and enure to the benefit of each of the parties hereto, their respective executors, administrators, successors and assigns, as the case may be.

5. The neuter gender, when used herein and in the acknowledgment hereafter set forth, shall include all persons and corporations, and words used in the singular shall include words in the plural where the text of the instrument so requires.

In witness whereof the parties have hereunto set their hands and seals, and the corporate parties hereto have caused these presents to be executed by their duly authorized officers, and their corporate seal to be hereto affixed.

Moris Miller (L. S.) Moris Miller & Sons, Inc.,
by Martin B. Miller, Vice President.

Signed, sealed and delivered in the presence of Harry Miller, Secretary.

[fol. 55] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER OF REFEREE—May 15, 1934

Duplicate proofs of claim having been filed herein by Morris Miller, each in the sum of $16,625.00, and objections thereto having been filed by Irving Trust Company Trustee in Bankruptcy, upon the ground that the amount of the indebtedness owing to the said claimant by the bankrupt is but the sum of $400.00, and the said Trustee having prayed that the said duplicate claims be consolidated, and as so consolidated reduced to the sum of $400.00.

Now, upon reading and filing the said objections to the claim of Morris Miller, and the notice bringing on the same for hearing before the undersigned, and due proof of service thereof, and the matter having duly come on for hearing, and it appearing that the amount of the indebtedness of the bankrupt to the claimant at the time of the filing of the petition in bankruptcy herein was the sum of $1,000.00, and it further appearing that the claimant has already received the sum of $600.00 upon account of said indebtedness, pur-
[fol. 56] suant to the Landlord and Tenant Act of the State of New Jersey, and that the balance due and owing the claimant is the sum of $400.00, and after hearing McManus, Ernst & Ernst, Lester D. Melzer, of counsel, attorneys for the Trustee in Bankruptcy, in support of the objections filed to the said claim, and Stroock & Stroock, Robert D. Steefel, of counsel, attorneys for Morris Miller, in opposition thereto, it is, on motion of McManus, Ernst & Ernst, attorneys for the Trustee in Bankruptcy,

Ordered that the duplicate claims filed herein by Morris Miller, be and they hereby are consolidated and the consolidated claim of Morris Miller be and it hereby is reduced from the sum of $16,625.00 to the sum of $400.00, and allowed as a general claim herein in the said sum of $400.00.

Dated, New York, May 15, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 57] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECISION OF REFEREE—May 9, 1934

Memorandum of Referee on Objections to Claim of Morris Miller

In this case the obligation was not certain in amount and event when the petition in bankruptcy was filed.

The claim should therefore be reduced to $400, being the sum of $1,000 due at the time of bankruptcy, less $600 priority payment under the New Jersey statute, heretofore paid.

Settle order on notice.

Dated, May 9th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 58] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION TO REVIEW

The petition of Morris Miller respectfully shows:

I. That said Morris Miller is a creditor of the above named bankrupt, having heretofore filed his proof of claim in the sum of $16,625, as more particularly appears from said proof of claim which is made a part hereof.

II. That by notice dated September 27th, 1933, Irving Trust Company as Trustee in Bankruptcy of the bankrupt herein requested the Referee to enter an order herein reducing the claim of the said Morris Miller to the sum of $400.

III. That a hearing was had before said Referee and thereafter, on May 15th, 1934, the Referee herein made an order, a copy of which is hereto annexed and made a part hereof. Said order was and is erroneous in that:

(a) The Referee erred in reducing the claim of Morris Miller from $16,625 to the sum of $400;

(b) The Referee erred in that he did not allow the claim of Morris Miller in the sum of $16,625;

(c) The Referee erred in holding that the claimant Morris Miller was not entitled to prove herein for a sum equal [fol. 59] to the present discounted value of the difference between the rent reserved under the lease referred to in claimant's proof of claim for the balance of the term thereof and the fair rental value of the premises at the date of the bankruptcy of the bankrupt herein;

(d) The Referee erred in holding that the claim of the claimant was not certain in amount and event when the petition in bankruptcy was filed;

(e) The Referee erred in his conclusions of law on the evidence offered at said hearing.

Wherefore, your petitioner feeling aggrieved because of such order, claims that the same may be reviewed as provided in the General Orders in Bankruptcy, Rule XXVII.

Dated Newark, N. J., May 22, 1934.

Morris Miller, Petitioner-Claimant.

Duly sworn to by Morris Miller. Jurat omitted in printing.

[fol. 60] In United States District Court, Southern District of New York

[Title omitted]

Referee's Certificate on Petition for Review of Order Reducing Claim of Morris Miller—Filed May 15, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

I, Oscar W. Ehrhorn, Referee in Bankruptcy in charge of the above entitled proceeding, do hereby certify:

That in the course of such proceeding, Irving Trust Company, the Trustee in Bankruptcy herein, filed objections to the claim of Morris Miller, which was filed herein in the

sum of $16,625, of which $600 claimed as priority, as a result of which, after proceedings duly had, an order was made and entered herein on May 15, 1934 allowing the claim at $1,000, of which $600 priority had heretofore been paid, leaving a balance due of $400.

[fol. 61] That thereafter, the claimant herein, feeling aggrieved thereat, filed with me his petition for review, which was granted.

That the errors complained of are set forth in such petition for review.

Pursuant to the provisions of General Order XXVII, I hereby certify that the question presented is whether the Referee was right in allowing to the landlord-claimant only the amount that was due for past rent unpaid at the time of the filing of the petition in bankruptcy, or whether he should have allowed to the landlord-claimant also the amount of $16,025 for damages for breach of the lease.

It was not disputed that at the time of the filing of the petition in bankruptcy there was due to the claimant for past due rent the sum of $1,000, but $600 of this sum was allowed as a priority claim, pursuant to the provisions of the Landlord and Tenant Act of the State of New Jersey, which $600 was heretofore paid to the claimant by the Trustee in Bankruptcy, leaving due the sum of $400.

The claimant contends that several months prior to the bankruptcy the tenant had breached the lease and vacated the premises; that the landlord was therefore entitled to prove the difference between the avails of reletting and the amount of rent that was provided for in the lease.

It is to be noted that the lease provided that in the event of a breach the tenant would pay to the landlord, monthly, the difference between the amount obtained on reletting and the reserved rent provided for in the lease.

As set forth in the Memorandum of the Referee dated May 9, 1934, at the time that the petition in bankruptcy was [fol. 62] filed the obligation was not certain in amount and event.

See In re Outfitters Operating Realty Co., Inc., Bankrupt —A. W. Perry, Inc., Appellant, v. Irving Trust Company, Appellee (C. C. A. 2d Circuit, per Learned Hand, Judge; In re Roth & Appel, 181 Fed. 667.

I hand up herewith for the information of the Judges, the following papers:

(1) Proof of claim Morris Miller for $16,625, filed September 23, 1932; and Amended Claim for same amount, of which $600 claimed as priority, filed February 23, 1933;

(2) Objection to same by Trustee, filed May 2, 1933;

(3) Notice of hearing on same, filed October 17, 1933; and subsequent notice of hearing, filed March 20, 1934;

(4) Memorandum of Referee reducing claim to $1,000, of which $600 heretofore paid, leaving $400 due, filed May 9, 1934;

(5) Order allowing claim allowing claim at $400, filed May 15, 1934;

(5) Petition for review, filed May 24, 1934;

(6) Stipulation of facts, Claimant's Exhibit A, April 5, 1934;

[fol. 63] (7) Testimony re claim Morris Miller (pages 4-5).

Pursuant to the practice duly adopted, I direct that the hearing on this certificate *he* had before the Honorable District Judge, holding the Bankruptcy Part, on Thursday, May 31, 1934, at 10:30 A. M.

I certify that copies of this certificate have been mailed to the following:

Messrs. Stroock & Stroock, attorneys for claimant, 141 Broadway, N. Y.

Messrs. McManus, Ernst & Ernst, attorneys for Trustee, 170 Broadway, N. Y.

Dated, New York, May 24th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 64] In United States District Court, Southern District of New York

In Bankruptcy

No. 55118

In the Matter of Sarnoff-Irving Hat Stores, Inc., Bankrupt

Re Claim of Morris Miller

Order Appealed From—Feb. 11, 1935

A motion having been duly made by Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., for an order dismissing the petition of Morris Miller, duly verified, and filed in the office of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, on the 24th day of May, 1934, for a review of the order of the said Referee, dated May 15th, 1934, reducing the claim filed herein by Morris Miller, to the sum of $400.00, and allowing the same as a general proof of claim herein in the said sum of $400.00, and after hearing McManus, Ernst & Ernst, Lester D. Melzer, of counsel, attorneys for Irving Trust Company, [fol. 65] as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., in support of the said motion, and Stroock & Stroock, Robert D. Steefel, of counsel, attorneys for Morris Miller, claimant, in opposition thereto, and upon the opinion heretofore filed herein, it is, on motion of McManus, Ernst & Ernst, attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc.,

Ordered that said order entered herein by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, be and it hereby is in all respects approved and confirmed; and it it further

Ordered that the petition filed herein on May 24th, 1934, for a review of said order, be and it hereby is denied.

Herbert, U. S. D. J.

[fol. 66] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 55118

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

OPINION OF HULBERT, J.—February 4, 1935

HULBERT, J.:

Morris Miller, landlord, petitions to review a Referee's report reducing claim filed by him against the bankrupt from $16,625.00 to $400.00.

It was stipulated that the claimant and the bankrupt entered into a lease for ten years on January 17th, 1928, which was modified in writing on December 29th, 1931. An equity action was begun in this District on April 27th, 1932 against the now-bankrupt Company and two Receivers were appointed. One of these Receivers subsequently resigned and the Irving Trust Company continued to act as the sole Receiver until it was elected and qualified as Trustee, and remained in possession of the premises until July 18th, 1932. On June 1st, 1932, said sole Receiver disaffirmed the lease and on July 18th, 1932, vacated the premises pursuant thereto. The claimant re-entered and took possession on July 25th, 1932. On August 27th, 1932, the Sarnoff-Irving Hat Stores, Inc., filed a voluntary petition in bankruptcy.

[fol. 67] The Proof of Claim filed by petitioner consisted of two items:

(a)	Rent for March and April, 1932, at $300.00 per month	$ 600.00
	and	
(b)	The difference between the rent reserved in the lease from May 1st, 1932 to July 31st, 1928 amounting to $32,000.00 and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	$16,025.00
	Total	$16,625.00

The first item (a) was filed as a priority claim, and the second (b) as a general claim.

The Trustee objected to the claim and sought to have it reduced to $1,000.00. After a hearing, the Referee reduced it to $400.00 ($600.00 having already been allowed and paid as a priority claim).

The claimant now seeks to review the Referee's findings.

The lease provided that in the event of a breach the [fol. 68] tenant would pay to the landlord, monthly, the difference between the amount obtained on reletting and the reserved rent provided for in the lease.

The questions involved in the instant case are (1) whether the claim is one founded upon a contract, express or implied, and provable under 63(a) of the National Bankruptcy Act and (2) whether the damages may be liquidated under 63(b) of the Act.

The breach having occurred before the petition in bankruptcy was filed, there seems to be no question that the claim is provable under 63(a) but there is a vigorous dispute that the claim can be liquidated under 63(b) and that was the ground upon which the Referee disallowed all but that amount accruing before bankruptcy.

The claimant contends that this case is not distinguishable from Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581, in which there was an anticipatory breach of an executory contract covering a license privilege for the maintenance and operation of a baggage and delivery concession, with a provision for damages similar to the one in this case. The Supreme Court held that intervening bankruptcy constituted a breach and held the claim for damages was one founded upon a contract express or implied and provable under 63(a), and that the damages could be liquidated under 63(b).

The claimant argues that since the breach of the lease in the instant case occurred some time before bankruptcy, and since the landlord had already re-entered before the filing of the petition, his damages now are those for the [fol. 69] breach of a personal covenant to pay damages and not for the breach of the lease and hence falls within the Chicago Auditorium case (supra).

However, it seems to me that:

First, the damages for the breach of the personal covenant are identical with those which could be claimed for

breach of the lease and are determinable in the same way. Clearly, the instant case comes within the class of those dealing with a breach of the landlord-tenant relationship.

Secondly, in the Chicago Auditorium case (supra), the Court said, at p. 590,

"besides which a number of cases arising out of the relation of landlord and tenant are cited: In re Ells, 98 Fed. Rep. 967; In re Pennewell, 119 Fed. Rep. 139; Watson v. Merrill, 136 Fed. Rep. 359; In re Roth & Appel, 181 Fed. Rep. 667; Colman Co. v. Withoft, 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the 'diversity between duties which touch the realty, and the mere personalty.' Co. Litt., 292, b, #513."

That would seem to indicate that the Court did not consider landlord and tenant type cases in its opinion and so the decision should not be binding as to them.

In Re Roth & Appel, 181 Fed. 667, decided in 1910 by the Circuit Court of Appeals, Second Circuit, there was a lease with a provision similar to the one here in question. The lessees became bankrupt and the landlord sought to prove a claim for damages for breach of the lease. The [fol. 70] Court said that claims for future rent were, of course, never provable and that this claim for damages was likewise not provable. It was said at p. 672:

"Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:

(1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.

(2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

It is significant that in the Roth case the landlord had already re-let the premises at a substantially lower rental prior to the filing of the claim which was after the petition was filed but before adjudication, and still the Court found

that the damages were too speculative, under (2) above, to be determined.

Later, in the case of Manhattan Properties, Inc. v. Irving Trust Co., 66 Fed. (2) 470, decided in 1933 by the Circuit Court of Appeals, Second Circuit, affirmed in 291 U. S. 320, the Court in discussing the Roth & Appel case said that its former determination as to the contingency of the claim [fol. 71] had been expressly overruled by Maynard v. Elliott, 283 U. S. 273, and "our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated." The provision of the lease in the Manhattan Properties case was like the one here involved but there was no breach until bankruptcy. A proof of claim for damages was filed and expunged on the authority of In re Roth & Appel (supra) and the decision was affirmed by the Supreme Court (supra).

In the case of In re Outfitters' Operating Realty Co., Inc.—A. W. Perry, Inc. v. Irving Trust Co., 69 Fed. (2) 90, decided in 1934 by the Circuit Court of Appeals, Second Circuit, and recently affirmed by the Supreme Court (not yet officially reported), a claim for damages for breach of lease was allowed—but there the provision was wholly different from the one here. The Circuit Court, in speaking of different covenants in leases, said:

"A common form, which was that in Re Roth & Appel (C. C. A. 2) 181 F. 667, 31 L. R. A. (N. S.) 270, is to pay on each rent day the difference between the rent reserved and rent received upon any re-letting; another is to indemnify the lessor for any loss suffered during the term. The second requires the lessor to wait till the end of the term (Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015); not so the first, under which a separate cause of action arises at the end of each period. *But in both kinds it is uncertain at petition filed whether there will be any loss, and that uncertainty is enough to invalidate the claim.*" (Italics mine.)

[fol. 72] While it is true that in the case of In re Mullings Clothing Co., 238 Fed. 58, decided in 1916 by the Circuit Court of Appeals, Second Circuit, a claim for damages for breach of a lease was allowed where a breach, occasioned by dissolution of the lessee corporation, occurred

before bankruptcy and the landlord had re-let at a lower figure before the petition in bankruptcy was filed, that decision has been strictly limited to its facts (cf. In re Metropolitan Chain Stores Inc., 66 Fed. [2] 482 at 484) and disapproved of by dicta in the Manhattan Properties case (supra), both cases decided in the Second Circuit in 1933.

It is also true that there are several statements in the Manhattan Properties case (supra) which tend to support the claimant's position. The Court, speaking through L. Hand, Circuit Judge, said:

"Moreover, the whole subject has taken on a new aspect from Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. The uncertainties attendant upon any future installments were as great as in the case of a covenant to pay rent under a lease."

Later on in the same case, in speaking of the doctrine of In re Roth & Appel and cases of similar import, the Court said,

"Finally, although the Bankruptcy Act has been since twice amended, Congress has made no change in this [fol. 73] feature. Indeed, as we shall show, it changed the law in this precise respect in one situation, but did not do so in this. For these reasons my brothers believe that it has become the settled law of this circuit and that we should adhere to it. For myself, while I recognize the force of the application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some changes must be taken, but that is often so."

Noting that this language appears in a case in which the provision in the lease was the same as that in the instant case, it might seem that if such a claim were provable under 63(a), the Court would find no difficulty liquidating

it under 63(b), and this point the claimant strongly urges. It should be remembered, however, that in the case quoted, the Court found that the claim was *not* provable under 63(*a*), so that all discussion of liquidating under 63(b) was merely dicta.

In the same case, the Court also said:

"The law, as we now understand it, is therefore that a contingent claim may in general be proved, provided its liquidation does not involve too speculative considerations, confessedly a variable standard. Among these will be the ability of the claimant himself to control the contingency."

[fol. 74] The claimant argues that his damage should be the difference between the rent reserved in the lease and the fair and reasonable rental for the remainder of the lease term. If that were the covenant, concededly the law now is that such a claim could be proved and liquidated (Perry case, supra). However, the provision in this lease is *not* as the claimant above argues. It is that the landlord may recover the difference between the rent reserved in the lease and *the amount obtained on re-letting, payable monthly.* While the ability of the claimant himself to control the *contingency* is not here involved, the ability of the claimant himself to control the *amount of the damages* is involved.

To allow such a claim as this would be to substitute the mere whim of the landlord for the safe standard of fair and reasonable rental and to make it possible for the landlord alone to fix the amount of his damages—even up to the total rent reserved in the lease. In my judgment this objection to such claims cannot be overcome and they are too speculative to be liquidated under 63(b).

In all events, I feel bound by the decisions in this District from In re Roth & Appel (supra) to and including the Perry case (supra). If the settled law of twenty-five years is to be overthrown, it should be by a court of appellate jurisdiction.

Accordingly, the Referee's report will be confirmed.

Dated, New York, N. Y., February 4th, 1935.

Hulbert, U. S. D. J.

[fol. 75] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that the undersigned hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 11th day of February, 1935, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, and from each and every part of said order.

Dated, New York, February 19th, 1935.

Yours, etc., Morris Miller, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

To McManus, Ernst & Ernst, Esqs., Attorneys for Trustee in Bankruptcy, Office and P. O. Address, No. 170 Broadway, Borough of Manhattan, City of New York.

[fol. 76] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL

Morris Miller, feeling himself aggrieved by the order entered in the above entitled proceeding in the office of the Clerk of this Court on the 11th day of February, 1935, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, reducing the claim of Morris Miller from $16,250 to $400, which claim was predicated upon an alleged breach of contract by the bankrupt, does hereby appeal from said order and from each and every part thereof, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and prays for an order allowing the said petitioner to prosecute said appeal, and

that a transcript of the record and proceedings on which said order is made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued directed to the Irving Trust Company as Trustee in Bankruptcy of the estate of the above named bankrupt, commanding it to appear before [fol. 77] the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain in justice to be done in the premises.

Dated, New York, February 19th, 1935.

Morris Miller, Petitioner, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The foregoing appeal from the order entered herein on the 11th day of February, 1935, be and the same hereby is allowed.

Dated, New York, March 2nd, 1935.

Hulbert, United States District Judge.

[fol. 78] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Morris Miller, claimant against the above estate in which an order was made on the 11th day of February, 1935, confirming the order made and entered herein on the 15th day of May, 1934, by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy in charge of this proceeding, reducing claimant's claim from $16,250 to $400, which order he claims is erroneous and for which he files the following Assignment of Errors:

First. That said order of February 11th, 1935, is erroneous in all respects in that the same is contrary to law.

Second. That the District Court erred in affirming the ruling of the Referee, in which the Referee reduced claimant's claim from $16,250 to $400.

Third. That the District Court erred in reducing claimant's claim from $16,250 to $400 and in disallowing that part of claimant's claim which sought damages for breach [fol. 79] of an agreement in the lease upon which said claim is predicated, to pay certain damages after termination of the lease.

Fourth. That the District Court erred in finding that claimant's damages were so speculative and uncertain that the same could not be liquidated under Section 63 (b) of the Bankruptcy Act.

Fifth. That the District Court erred in determining that the damages which claimant seeks are for breach of a real covenant instead of a personal covenant.

Sixth. That the District Court erred in its conclusions of law on the evidence offered at the hearing before the Referee herein.

Wherefore, Morris Miller, petitioner, prays that the said order be reversed and that the District Court of the United States for the Southern District of New York be directed to enter an order reversing its order and reversing the decision of the Referee.

Dated, New York, February 19th, 1935.

Morris Miller, Claimant, by Stroock & Stroock, Attorneys, Office and P. O. Address, No. 141 Broadway, Borough of Manhattan, City of New York.

[fol. 80] Citation in usual form omitted in printing.

[fol. 81] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, March 27, 1935.

Stroock & Stroock, Attorneys for Appellant. McManus, Ernst & Ernst, Attorneys for Appellee.

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] In United States Circuit Court of Appeals for the Second Circuit

In re Sarnoff-Irving Hat Stores, Inc., Bankrupt

Morris Miller, Appellant,

against

Irving Trust Company, as Trustee, Appellee

Before L. Hand, Swan and Chase, Circuit Judges

On Appeal from the United States District Court for the Southern District of New York

Robert D. Steefel for the appellant.
Lester D. Melzer for the appellee.

Opinion—Filed May 6, 1935

Per Curiam:

Order affirmed on authority of In re F. & W. Grand 5-10-25¢ Stores, 74 Fed. (2) 654 (C. C. A. 2).

[File endorsement omitted.]

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

MORRIS MILLER, Appellant

DECREE—Filed May 13, 1935

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 85] [File endorsement omitted.]

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 847, Urban Properties Co. vs. Irving Trust Company, as Trustee in Bankruptcy of F. & W. Grand 5-10-25 Cent Stores.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,618. U. S. Circuit Court of Appeals, Second Circuit. Term No. 67. Morris Miller, Petitioner, vs. Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt. Petition for a Writ of Certiorari and Exhibit thereto. Filed May 23, 1935. File No. 67, O. T., 1935.

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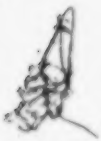

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. [redacted] 67

MORRIS MILLER,

Petitioner,

v.

IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

SOL M. STROOCK,
Attorney for Petitioner.

INDEX

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of the Facts	2
The Questions Presented	3
Reasons Relied on for Allowance of the Writ	4
Petitioner's Brief in Support of Petition for Writ of Certiorari	7
Opinions of the Courts Below	7
Jurisdiction	7
Statement of the Facts	7
Summary of the Argument	8
Point I	8
Point II	9
Point III	10
Point IV	11
Conclusion	13

List of Authorities

(A) *Cases*

Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581 ..... 9, 11

Hall v. Gould, 13 N. Y. 127 9

Irving Trust Company v. A. W. Perry, Inc., 293 U. S. 320 ..... 5, 9, 12

Lloyd Investment Co. v. Schmidt, 66 F. (2d) 371 (C. C. A. 7) Cert. Den. 291 U. S. 668 ..... 4, 9, 12

PAGE

Malavazos v. Irving Trust Company, 66 F. (2d) 482 (C. C. A. 2) 11

Manhattan Properties v. Irving Trust Company, 291 U. S. 320 .....5, 9, 10, 12

Maynard v. Elliott, 283 U. S. 273 10

McCready v. Lindenborn, 172 N. Y. 400 9

Urban Properties Company v. Irving Trust Company, 74 F. (2d) 654 (C. C. A. 2d) Cert. Granted May 6, 1935 .....3, 4, 5, 7, 11, 12, 13

Wm. Filene's Sons Co. v. Weed, 245 U. S. 597 .... 9, 12

(B) Statutes

Bankruptcy Act, Sec. 63(a) 8, 10, 11

Bankruptcy Act, Sec. 63(b) 8, 3, 11

Judicial Code, Sec. 240(a) as amended by Act of February 13, 1925 (43 Stat. 938) 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No.

MORRIS MILLER, Petitioner, *against* IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt, Respondent.	PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Morris Miller respectfully shows to this Honorable Court:

Your petitioner, claimant-appellant below, applies for a writ of certiorari to review the final order of the United States Circuit Court of Appeals for the Second Circuit, entered May 6th, 1935, affirming final order of the United States District Court for the Southern District of New York (Hon. MURRAY HULBERT, D. J.). This order confirmed an order by the Referee in Bankruptcy reducing the claim of petitioner against the above named bankrupt from the sum of $16,625 to the sum of $400, and expunging the claim for the balance.

Summary Statement of the Facts.

The bankrupt as tenant entered into a lease with petitioner as landlord for a term commencing August 1st, 1928 and ending July 31st, 1938, of premises 203 Springfield Avenue, Newark, N. J.

On April 27th, 1932, and after the bankrupt had been in possession of the premises for nearly four years, an Equity Receiver was appointed for the bankrupt by the United States District Court for the Southern District of New York. On June 1st, 1932, the said Equity Receiver disaffirmed the said lease and on July 18th, 1932, vacated possession of the premises. The claimant, pursuant to the terms of said lease, reentered the premises and took possession on July 25th, 1932.

Thereafter, and on August 27th, 1932, the lessee filed a voluntary petition in bankruptcy. Thus the lease had been terminated and there had been a reentry by the landlord prior to bankruptcy. After bankruptcy the landlord relet, to third parties, the premises abandoned by the Equity Receiver, for the balance of the term and at a rental substantially lower than that payable by the bankrupt under its lease.

The lease to the bankrupt contained the usual indemnity clause that in the event of termination of the lease, the tenant would continue liable for the difference between the rent reserved in the lease and the avails of reletting, to be paid monthly on the several rent days specified in the lease.

Petitioner filed proof of claim in bankruptcy in the sum of $16,625. He has already received $600 of said sum as a preferred claim under the local laws of New Jersey. Both the District Court and the Circuit Court of Appeals have decreed that petitioner is entitled to claim for an additional $400 for rent that became owing prior to the bankruptcy. The balance of said claim, which is

to recover petitioner's damages, has been expunged by the courts below. The amount of petitioner's damages has not been adjudicated. It was stipulated before the Referee in Bankruptcy that the determination of *the amount* of petitioner's damages and the liquidation of his claim be reserved pending determination of the question of law as to whether petitioner has a provable claim for said damages.

Similar facts, involving substantially the same questions of law, were involved in the case of *Urban Properties Company* v. *Irving Trust Company,* which was decided by the Circuit Court of Appeals, Second Circuit, in January of this year (74 F. [2d] 654). This Court has just granted (May 6th, 1935) a writ of certiorari in that case.

The Questions Presented.

1. Where a lease is terminated by a landlord by reason of the tenant's default, and the landlord reenters prior to bankruptcy, does an ensuing bankruptcy constitute an anticipatory breach of an indemnity contract contained in the lease and has the landlord a provable claim for the damages resulting from such anticipatory breach of the indemnity contract?

2. Is the measure of damages for such anticipatory breach of the indemnity contract the difference between the rent reserved in the lease and the fair rental value of the premises, having due regard to the present cash value of payments ordinarily payable over a period of years, and are such damages so difficult of determination as to render them incapable of liquidation under §63-b of the Bankruptcy Act?

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit herein is directly in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Lloyd Investment Co.* v. *Schmidt,* 66 F. (2d) 371 (cert. den. 291 U. S. 668).

2. This case involves substantially the same questions of law as are present in the case of *Urban Properties Company* v. *Irving Trust Company,* as Trustee in Bankruptcy of F. & W. Grand 5-10-25 Cent Stores, Inc., Bankrupt. In that case the Circuit Court of Appeals for the Second Circuit rendered a decision expunging the claim of the landlord, substantially similar to the claim of the landlord herein (74 F. [2d] 654). The landlord in that case applied to this Court for a writ of certiorari. The landlord's petition was granted by this Court by decision handed down on May 6th, 1935.

3. In the application for certiorari in the *Urban Properties* case, it was urged that the decision in that case (*Urban Properties*) conflicted with the decision in *Lloyd Investment Co.* v. *Schmidt,* 66 F. (2d) 371, *supra.* In principle that is true. Factually, however, *Lloyd Investment Co.* v. *Schmidt* is *identical* with the case at bar and only *similar* to the facts in the *Urban Properties* case, and the decision of the Seventh Circuit in that case conflicts directly with the decision of the Second Circuit herein.

4. The questions embodied in the instant case should be determined simultaneously with the questions involved in *Urban Properties Company* v. *Irving Trust Company,* 74 F. (2d) 654, *supra,* so that all doubts as among the various Circuits may be resolved. Indeed, the factual situation presented in the case at bar will arise more fre-

quently than that in the *Urban Properties* case. In the *Urban Properties* case the lease was terminated before the term ever began; in the case at bar the lease was terminated after the tenant had been in possession for several years. From a practical point of view, a decision on the factual situation involved in the case at bar is apparently of more general importance than a determination of the *Urban Properties* case.

5. The law governing landlord's claims in bankruptcy is uncertain in those cases where the facts are not the same as in *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, and *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320. A determination by the Supreme Court of the questions involved in the *Urban Properties* case and this case will substantially end the uncertainty now existing.

6. A decision of the *Urban Properties* case may not necessarily dispose of all of the questions involved in the case at bar and it is therefore of importance that all of the questions presented here be finally determined beyond any doubt.

7. The decision in the Circuit Court of Appeals herein is incorrect and in conflict with the reasoning of this Court in *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, *supra*.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Second Circuit, and that the order of said Court be reversed, and that the argument of the appeal herein be set down for the same date to be set for the argument of the appeal in the case of *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*.

SOL M. STROOCK,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. _____

MORRIS MILLER,
Petitioner,
against
IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States District Court is not yet reported. The United States Circuit Court of Appeals for the Second Circuit handed down a per curiam opinion as follows:

> "Order affirmed on authority of In re F. & W. Grand 5-10-25¢ Stores, 74 Fed. (2) 654 (C. C. A. 2)."

Jurisdiction.

The order of the Circuit Court of Appeals was made and entered on May 6th, 1935. The jurisdiction of this Court is invoked under §240-a of the Judicial Code as amended by the Act of February 13th, 1925 (43 Stat. 938). The petition was filed in accordance with Rule 38 of this Court.

Statement of the Facts.

A full statement of the facts will be found under the heading "Summary Statement of the Facts" in the peti-

tion for writ of certiorari, to which this brief is annexed. In the interest of brevity this statement will not be repeated.

Summary of the Argument.

1. The termination of the lease and re-entry by the landlord upon the tenant's default invoked by the terms of the lease an independent personal contract by the tenant to pay damages.

2. The subsequent bankruptcy of the tenant constituted an anticipatory breach by the tenant of its personal contract to pay damages.

3. The anticipatory breach of this personal contract gave rise to a claim in favor of the landlord and against the tenant for the fair value of the personal contract that was so breached, which is the difference between the amount of rent payable under the lease that was terminated and the fair rental value of the premises at the date of bankruptcy. This is a debt that was owing at the time of bankruptcy within §63-a of the Bankruptcy Act.

4. Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(b)" of §63 of the Bankruptcy Act.

POINT I.

The termination of the lease and re-entry by the landlord upon the tenant's default invoked by the terms of the lease an independent personal contract by the tenant to pay damages.

Prior to bankruptcy the lease had been terminated and the relationship of landlord and tenant no longer existed, and all that remained was a personal contract between

the former landlord and the former tenant whereby the former tenant agreed to pay the former landlord damages for its breach of the lease in amounts and in the manner specified in the written contract.

Hall v. *Gould*, 13 N. Y. 127;
McCready v. *Lindenborn*, 172 N. Y. 400;
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597;
Manhattan Properties v. *Irving Trust Company*, 291 U. S. 320.

In the last cited case, this Court stated (p. 338):

"In both cases the lessor has the choice whether he will terminate the lease * * *. And upon the exercise of the option by the landlord a new contract distinct from that involved in the original letting becomes operative."

POINT II.

The subsequent bankruptcy of the tenant constituted an anticipatory breach by the tenant of its personal contract to pay damages.

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581;
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597, *supra*;
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320;
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7).

In *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, this Court stated (p. 338):

"While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract

entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. *For here the landlord does not rely upon the destruction of his contract by the bankruptcy;* he initiates a new contract of indemnity by the affirmative step of reentry. And this new contract comes into being not by virtue of the bankruptcy proceeding but by force of the act of reentry which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy and cannot be breached until the duty of indemnifying the landlord arises." (Italics ours.)

In the *Manhattan Properties* case, bankruptcy, as the Court stated, could not constitute anticipatory breach of the independent contract, because this contract did not arise until after bankruptcy, but in the case at bar the independent contract came into being *prior* to the bankruptcy and the landlord does "rely upon the destruction of his contract by the bankruptcy".

POINT III.

The anticipatory breach of this personal contract gave rise to a claim in favor of the landlord and against the tenant for the fair value of the personal contract that was so breached, which is the difference between the amount of rent payable under the lease that was terminated and the fair rental value of the premises at the date of bankruptcy. This is a debt that was owing at the time of bankruptcy within §63-a of the Bankruptcy Act.

Whatever doubt there may have been prior thereto on the authorities, the case of *Maynard* v. *Elliott*, 283 U. S. 273, settled the law that it is no objection to proving a claim in bankruptcy that the claim is contingent.

Whatever contingencies there may be in regard to the damages suffered by petitioner in the case at bar were

likewise present in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581, *supra*, wherein this Court held the claim a provable one in bankruptcy. It would appear that this Court has long since settled the question that a claim for anticipatory breach of a personal contract is a debt owing at the time of bankruptcy and provable under §63-a of the Bankruptcy Act.

POINT IV.

Such damages are fair and reasonable and are not speculative and are capable of liquidation under Subdivision "(b)" of §63 of the Bankruptcy Act.

The Circuit Court of Appeals for the Second Circuit has ruled adversely to claims of the type involved in the case at bar, on the ground that the measure of damage is so speculative that the claim is incapable of liquidation under subdivision "(b)" of §63 of the Bankruptcy Act.

Urban Properties Company v. *Irving Trust Company*, 74 F. (2d) 654;
Malavazos v. *Irving Trust Company*, 66 F. (2d) 482.

It is clear that the Circuit Court of Appeals in its decision herein relied on the same grounds, for it affirmed the order of the District Court "on the authority of" the *Urban Properties* case. The essence of this argument is that although the Court concedes that the claimant has a contract claim which was owing at the time of bankruptcy and that the claimant has incurred a loss, nevertheless, the machinery of the bankruptcy courts is inadequate to assess the amount of that loss.

We urge that the bankruptcy courts, being courts of equity, are not so rigid or restricted in their powers that

they are incapable of giving fair and just redress to one who concededly has a claim and has suffered a loss. Indeed, liquidation of petitioner's claim in the case at bar would be neither difficult nor speculative. This Court has already described a contract for the payment of the difference between the rent reserved and the rental value of the premises as:

> "a personal covenant that liquidated the damages upon a footing that was *familiar and fair.*" (Italics ours)—(*Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597.)

This Court likewise enforced such a clause in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, *supra*. Can it be that this same measure of damages is more difficult to compute or more speculative when it follows as the natural measure of damages for breach of a personal contract than where it is specified in a contract as the measure to be used in liquidating damages?

The Circuit Court of Appeals in the Seventh Circuit differs from the conclusion of the Circuit Court of Appeals in the Second Circuit, for in *Lloyd Investment Co.* v. *Schmidt*, 66 F. (2d) 371, *supra*, the Court concluded that damages were not too speculative under facts identical with those in the case at bar, and permitted the liquidation thereof and the allowance of the claim.

In *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*, Judge MANTON, in dissenting, concluded that such damages were not speculative.

The question as to whether or not damages of this kind are too speculative to be capable of liquidation is one of the principal questions that was left undecided by the *Manhattan Properties* case, and for this reason alone, if for no other, we submit that it is important that petitioner's writ of certiorari should be granted so that this important question of law may be authoritatively determined.

Conclusion.

Most of the questions here involved will be presented to this Court shortly by virtue of the granting of petition for writ of certiorari in *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*. The remaining questions that are involved in this case, and which are not involved in the *Urban Properties* case, should also be determined at the same time, because:

(a) The decision in the Circuit Court of Appeals in this case is directly opposed to the decision of the Circuit Court of Appeals in the Seventh Circuit; and

(b) Factually the situation involved in the case at bar is likely to occur more frequently than the factual situation involved in the *Urban Properties* case.

Respectfully submitted,

SOL M. STROOCK,
Attorney for Petitioner.

FILE COPY

FILED
SEP 26 1935
CHARLES ELMORE CROPLEY
CLERK

To be argued by
ROBERT D. STEEFEL.

Supreme Court of the United States

OCTOBER TERM 1935

No. 67.

MORRIS MILLER,

Petitioner,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

STROOCK & STROOCK,
Attorneys for Petitioner.

SOL M. STROOCK,
ROBERT D. STEEFEL,
of Counsel.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
SPECIFICATION OF ERRORS	2
STATEMENT OF THE FACTS	3
STATUTE INVOLVED	4
OUTLINE OF ARGUMENT	5
POINT I —The Termination of the Lease and the Reentry by the Landlord upon the Tenant's Default invoked, by the Terms of the Lease, an Independent Personal Contract by the Former Tenant to pay Damages	6
POINT II —The Subsequent Bankruptcy of the Former Tenant constituted an Anticipatory Breach by the Former Tenant of such Personal Contract to pay Damages	7
POINT III—Petitioner's Claim for Damages, resulting from such Anticipatory Breach of said Personal Contract, was a Claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a Claim provable under §63 (a) of the Bankruptcy Act	9
POINT IV—Such Damages are Fair and Reasonable and are not Speculative and are Capable of Liquidation under subdivision "(b)" of §63 of the Bankruptcy Act	15
POINT V —No Tenable Arguments have been advanced which justify disallowing Petitioner's Claim	20
POINT VI—The Order of the Circuit Court of Appeals should be reversed	22

LIST OF AUTHORITIES

(a) Cases:

PAGE

Carroll Electric Co. v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1) 19
Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581, 60 L. Ed. 811 .....7, 8, 10, 15, 17, 20, 21, 22
Cobb v. *Overman*, 109 Fed. 65 (C. C. A. 4).... 18

Gardiner v. *Butler*, 245 U. S. 603, 62 L. Ed. 505 6

Hall v. *Gould*, 13 N. Y. 127 6
Heyward v. *Goldsmith*, 269 Fed. 946 (C. C. A. 3) 19

In Re Beverlyridge Co., 35 F. (2d) 818 (C. C. A. 9) 7
In Re Ell's, 98 Fed. 967 (D. C. Mass.) 8
In Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2) 7, 14, 18
In Re Metropolitan Chain Stores, 66 F. (2d) 485 (C. C. A. 2) 14
In Re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2)—(Cert. denied 243 U. S. 635) 7, 12, 13, 15
In Re Nye, 22 F. (2d) 558 (D. C. Minn.) 19
In Re Roth & Appel, 181 Fed. 667 (C. C. A. 2) 8
In Re Schultz & Guthrie, 235 Fed. 907 (D. C. Mass.) 19
In Re Schuyler Chadwick & Burnham, 63 F. (2d) 241 (C. C. A. 2) 7
In Re Stern, 116 Fed. 604 (C. C. A. 2) 19
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320, 79 L. Ed. 141 .....6, 7, 9, 10, 14, 15, 19, 20, 21, 22

Kalkhoff v. *Nelson*, 60 Minn. 284 16

Leo v. *Pierce Stores Co.*, 57 F. (2d) 340 (D. C. Mich.) 16
Lesser v. *Gray*, 236 U. S. 70, 59 L. Ed. 71..... 7
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7)—(Cert. denied 291 U. S. 668) 7, 11, 12, 15

LIST OF AUTHORITIES (contd.)

(a) Cases (contd.):

	PAGE
Malavazos v. *Irving Trust Company*, 66 F. (2d) 482 (C. C. A. 2)—(Cert. granted 290 U. S. 620)	16
Manhattan Properties, Inc. v. *Irving Trust Company*, 291 U. S. 320, 78 L. Ed. 825, 66 F. (2d) 470	2, 6, 7, 9, 11, 12, 13, 16, 18, 21
Maynard v. *Elliott*, 283 U. S. 273, 75 L. Ed. 1028	10, 11
McCready v. *Lindenborn*, 172 N. Y. 400	6
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98	16
Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. 721 (C. C. A. 2)	15
Portage Rubber Co., 296 Fed. 289 (C. C. A. 6)	19
Quinn v. *Jaloff*, 71 F. (2d) 707 (C. C. A. 9)	12
Reading Iron Works—Sweatman's Appeal, 150 Penn. St. Rep. 369	16
Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953	7, 8, 15, 17, 20, 21
Slater v. *Von Chorus*, 120 App. Div. 16 (N. Y.)	6, 16
Urban Properties Company v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2)	4, 10, 14, 16, 18
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597 62 L. Ed. 497	6, 19, 20
Williams v. *U. S. Fidelity Co.*, 236 U. S. 549, 59 L. Ed. 713	8, 10

(b) Text Book:

Sedgwick on Damages, 9th Ed. §636-d	16

(c) Statutes:

Bankruptcy Act §63 (a)	4
Bankruptcy Act §63 (b)	5
Judicial Code §240 (a) as amended by Act of February 13, 1925 (43 Stat. 938)	2

Supreme Court of the United States

OCTOBER TERM 1935

No. 67.

MORRIS MILLER,
Petitioner,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The District Court (Judge MURRAY HULBERT) rendered an opinion which is not reported (R. 43-48). The United States Circuit Court of Appeals for the Second Circuit rendered a memorandum opinion which is not reported (R. 52).

Jurisdiction.

The order of the Circuit Court of Appeals was made and entered on May 6th, 1935 (R. 53). Writ of certiorari to review the decision of the Circuit Court of Ap-

peals was granted by this Court on the 3rd day of June, 1935 (R. 53). The jurisdiction of this Court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (43 Stat. 938).

Question Presented.

Stated broadly, the question for determination is:

Has a former landlord who has terminated a lease and reentered prior to the bankruptcy of the former tenant a provable claim against the estate in bankruptcy of such former tenant for damages for the breach of such tenant's personal covenant in the lease indemnifying the landlord against loss of rents after the termination of the lease? This is in no sense a claim by a landlord for future rent or for damages for breach of a lease, but is a claim by a creditor (who formerly was a landlord) for damage for breach of a personal contract of indemnity.

Specification of Errors.

The Court below erred in the following respects:

1. In holding that the claim for damages for breach of the independent personal contract was not as a matter of law a provable debt.

2. In failing to distinguish between petitioner's claim for damages for breach of a personal contract and the landlord's claim for damages for breach of a lease in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320 (78 L. Ed. 825).

3. In holding that petitioner's damages were so speculative as to be incapable of liquidation under §63 (b) of the Bankruptcy Act.

4. In affirming the decree of the District Court disallowing petitioner's claim.

Statement of the Facts.

All of the facts are conceded and were stipulated at the hearing before the Referee in Bankruptcy (R. 19).

Morris Miller, the petitioner, as landlord, entered into a written lease with the bankrupt as tenant for a term commencing August 1st, 1928 and ending July 31st, 1938, covering premises 203 Springfield Avenue, Newark, New Jersey (R. 5-12).

On April 27th, 1932, and after the bankrupt had been in possession for nearly four years, an Equity Receiver was appointed for the bankrupt, by the United States District Court for the Southern District of New York (R. 20). On June 1st, 1932, the said Equity Receiver disaffirmed the said lease and on July 18th, 1932, vacated possession of the premises (R. 21). Claimant thereupon reentered the premises and took possession thereof on July 25th, 1932. *Thereafter,* and on August 27th, 1932, the lessee filed a voluntary petition in bankruptcy (R. 21). Thus, the lease had been terminated and there had been a reentry by the landlord prior to bankruptcy. After bankruptcy the landlord relet the premises abandoned by the Equity Receiver, for the balance of the term and at a rental substantially lower than that payable by the bankrupt under its lease (R. 22-36).

The lease to the bankrupt contained the usual indemnity clause that in the event of termination of the lease, the tenant agreed to pay to the landlord the difference between the rent reserved in the lease and the avails of reletting, to be paid monthly (R. 7).

Petitioner filed proof of claim in bankruptcy in the sum of $16,625 (R. 1-4). He has already received $600 of said sum as a preferred claim under the local laws of New Jersey (R. 37). Both the District Court and the Circuit Court of Appeals have decreed that petitioner is entitled to claim for an additional $400 for rent that became owing prior to the bankruptcy. The balance of

such claim, which is to recover petitioner's damages pursuant to the indemnity covenant after termination of the lease, has been expunged by the Courts below (R. 37, 42, 53). The amount of petitioner's damages has not been adjudicated. It was stipulated before the Referee in Bankruptcy that the determination of the *amount* of petitioner's damages and the liquidation of his claim be reserved pending determination of the question of law as to whether petitioner has a provable claim for said damages (R. 19-20).

The Circuit Court of Appeals, in affirming the decision of the District Court, rendered a memorandum opinion to the effect that the order of the District Court was affirmed on the authority of *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2) (R. 52). This last case involves substantially the same questions of law as are presented in the case at bar. This Court has likewise granted a writ of certiorari from the decision of the Circuit Court of Appeals in the said *Urban Properties* case, and when this Court granted the writ of certiorari to the petitioner herein, it directed that the within appeal be argued immediately after the argument of the appeal in the said *Urban Properties* case (R. 53).

Statute Involved.

The pertinent provisions of § 63 of the Bankruptcy Act are as follows:

> "*Debts provable against.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; • • •

(4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1st, 1898, § 63, 30 Stat. 562 as amended; U. S. C. A. Title 11, Chap. 7, § 103.)

Outline of Argument.

1. The termination of the lease and the reentry by the landlord upon the tenant's default invoked, by the terms of the lease, an independent personal contract by the former tenant to pay damages.

2. The subsequent bankruptcy of the former tenant constituted an anticipatory breach by the former tenant of such personal contract to pay damages.

3. Petitioner's claim for damages, resulting from such anticipatory breach of said personal contract, was a claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a claim provable under § 63 (a) of the Bankruptcy Act.

4. Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(b)" of § 63 of the Bankruptcy Act.

5. An analysis of various arguments that have from time to time been urged as reasons for disallowing a claim of the kind involved in the case at bar discloses that they are all without foundation.

THE ARGUMENT.

POINT I.

The termination of the lease and the reentry by the landlord upon the tenant's default invoked, by the terms of the lease, an independent personal contract by the former tenant to pay damages.

It has long been a settled rule of the substantive law that when a lease is terminated and the landlord reenters, the relationship of landlord and tenant ceases, and if the lease contains an indemnity contract this is an independent personal contract which survives the termination of any and all relationship of landlord and tenant.

Hall v. *Gould,* 13 N. Y. 127;
McCready v. *Lindenborn,* 172 N. Y. 400;
Slater v. *VonChorus,* 120 App. Div. 16 (N. Y.);
Wm. Filene's Sons Co. v. *Weed,* 245 U. S. 597 (62 L. Ed. 497);
Gardiner v. *Butler,* 245 U. S. 603 (62 L. Ed. 505);
Irving Trust Company v. *A. W. Perry, Inc.,* 293 U. S. 320 (79 L. Ed. 141);
Manhattan Properties, Inc. v. *Irving Trust Company,* 291 U. S. 320 (78 L. Ed. 825).

In the last cited case, this Court stated (p. 338):

> "In both cases the lessor has the choice whether he will terminate the lease. *. * * And upon the exercise of the option by the landlord, a new contract, distinct from that involved in the original letting, becomes operative."

POINT II.

The subsequent bankruptcy of the former tenant constituted an anticipatory breach by the former tenant of such personal contract to pay damages.

After some doubts in the early law, it is now settled that bankruptcy constitutes an anticipatory breach of all types of executory or partly executory personal contracts.

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811);
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174);
Roehm v. *Horst*, 178 U. S. 1 (44 L. Ed. 953);
Manhattan Properties, Inc. v. *Irving Trust Company*, 291 U. S. 320 (78 L. Ed. 825);
Lesser v. *Gray*, 236 U. S. 70 (59 L. Ed. 71);
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);
In Re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2), (Cert. denied 243 U. S. 635), (59 L. Ed. 471);
In Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2);
In Re Beverlyridge Co., 35 F. (2d) 818 (C. C. A. 9);
In Re Schuyler Chadwick & Burnham, 63 F. (2d) 241 (C. C. A. 2).

In *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811), (*supra*), this Court stated (pp. 591-592):

"Commercial credits are, to a large extent, based upon the reasonable expectation that pending con-

> tracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Rochm* v. *Horst*, *supra*."

We submit that the lower Courts have become confused on this point as a result of their failure to recognize the effect, in the case at bar, of the termination of the lease prior to bankruptcy. It has been held (*In Re Ell's*, 98 Fed. 967, D. C. Mass., and *In Re Roth & Appel*, 181 Fed. 667 (C. C. A. 2), that bankruptcy does not constitute an anticipatory breach of a lease and does not in and of itself destroy the relationship of landlord and tenant. This exception is founded upon the dictum of Lord Coke which was carefully pointed out by this Court in the *Chicago Auditorium* case, *supra* (p. 590):

> "Cases of the latter class are distinguishable, because of the 'diversity betweene duties which touch the realty, and the meere personalty.'"

It was therefore a necessary conclusion from these authorities that this Court held in the *Manhattan Properties* case *supra*, that because the lease had not been terminated prior to the bankruptcy and because bankruptcy does not terminate covenants real, there was no claim in existence at the time of the filing of the petition in bankruptcy.

In the case at bar the difficulties presented in the *Manhattan Properties* case and the line of cases above referred to do not exist. The lease was gone before the petition was filed. There are no covenants real involved. There is a simple personal contract by the former tenant to pay indemnity. This personal contract does not differ from any of those in the numerous cases hereinbefore cited where this Court and the various Circuit Courts of Appeal have held *without exception* that bankruptcy terminates executory personal contracts.

As this Court stated in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174), *supra:*

> "The claim is not for rent reserved or upon the lease as such, but is founded upon an independent express contract, and hence within the very words of § 63 (a) 4."

POINT III.

Petitioner's claim for damages, resulting from such anticipatory breach of said personal contract, was a claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a claim provable under §63 (a) of the bankruptcy act.

We have hereinbefore quoted the relevant provisions of §63 of the Bankruptcy Act (page 4 of this brief). The damages which petitioner incurred by the anticipatory

breach of the personal indemnity contract are "founded on a contract", are "a fixed liability" and were "absolutely owing at the time of the filing of the petition".

Indeed, the lower Courts in the case at bar do not dispute that petitioner has a fixed claim which is provable under §63 (a) of the Bankruptcy Act. Judge HULBERT, in his opinion, stated:

> "The breach having occurred before the petition in bankruptcy was filed, there seems to be no question that the claim is provable under 63 (a) but there is a vigorous dispute that the claim can be liquidated under 63 (b)."

(We will discuss in a later point the question of liquidation under 63 [b].)

In *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2), upon which case the Circuit Court of Appeals decided the case at bar, the Court stated (p. 656):

> "The difficulty in neither case is that a cause of action has not accrued, but that the amount of the recovery is uncertain."

It is no longer open to doubt, since the decisions of this Court in the last few years, that a claim like petitioner's is not contingent and is provable under §63 (a).

Williams v. *U. S. Fidelity Co.*, 236 U. S. 549; (59 L. Ed. 713);
Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581; (60 L. Ed. 811);
Maynard v. *Elliott*, 283 U. S. 273; (75 L. Ed. 1028);
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320; (79 L. Ed. 174).

In the *Chicago Auditorium* case, *supra*, this Court stated (p. 592):

> "The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of § 63a-4, and the damages may be liquidated under § 63b."

In *Maynard* v. *Elliott, supra,* this Court stated (p. 275):

> "Although the omission of any reference to contingent claims in § 63 of the present act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed."

Petitioner's claim is founded upon contract; it came into being upon the filing of the petition in bankruptcy; it was then subject to no contingency whatsoever, and it was then susceptible of liquidation.

It is argued that, however logical be our claim, history and precedent are against us. We will demonstrate that the fact is to the contrary.

When the *Manhattan Properties* case was presented to this Court it found itself reluctant to allow the landlord a provable claim because, among other reasons, a long body of lower Court decisions had refused to permit a landlord to prove in bankruptcy for loss of *future rents.* Where the lease was terminated prior to bankruptcy, on the other hand, as in the case at bar, every reported decision (until the decisions herein) *allowed* the claim.

No case has as yet been presented to this Court where the lease was terminated prior to the filing of the petition in bankruptcy, except *Lloyd Investment Co.* v. *Schmidt,* 291 U. S. 668. That case is identical with the case at bar and the Circuit Court of Appeals for the Seventh Circuit allowed the creditor's claim (66 F. 2d 371 C. C. A. 7). The Trustee in Bankruptcy petitioned this Court for certiorari. The opinion of this Court in the

Manhattan Properties case was handed down on February 5th, 1934. It is significant that this Court denied certiorari in the *Lloyd Investment Co.* case on February 12th, 1934.

A careful research on our part has disclosed only two cases in the Circuit Courts of Appeals where the lease was terminated prior to bankruptcy, and a third where such a situation was discussed in dicta.

> *In Re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2), (Cert. denied 243 U. S. 635);
> *Lloyd Investment Co.* v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);
> *Quinn* v. *Jaloff*, 71 F. (2d) 707 (C. C. A. 9).

In *Lloyd Investment Co.* v. *Schmidt, supra,* the Court stated (p. 372):

> "(1) In the instant case the breach occurred before the bankruptcy proceedings were begun. It is, therefore, not analogous to the ordinary bankruptcy case where an insolvent tenant is adjudged a bankrupt and the landlord presents a claim against the bankrupt estate for damages arising out of the breach which the adjudication in bankruptcy occasioned. Upon the breach of the lease by bankrupt's assignee in the case before us, a cause of action arose in favor of appellant. While such cause of action represents a claim which was not liquidated, it was nevertheless not a contingent claim. The mere fact that more than one remedy is given to one whose contract has been breached does not make the claim for damages contingent.
>
> (2) Our conclusion is that prior to the commencement of the bankruptcy proceedings, there existed a valid claim for damages in favor of appellant, and, there being no evidence of collusion between said appellant and the lessee whereby appellant's claim was allowed to ripen into a provable claim in bankruptcy before the adjudication occurred, the claim

presented was one provable against the estate of the bankrupt lessee."

In *In Re Mullings Clothing Co., supra,* the Court stated (p. 67):

> "A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it. If it is certain that he is liable to pay it, although it may be uncertain how much he will have to pay, the claim is unliquidated but it is not contingent. * * *"

Page 68:

> "The provable debts are those which existed at the time of the filing of the petition in bankruptcy. * * * In this case the obligation incurred by the repudiation of the lease existed at the time of the filing of the petition."

The reasoning of the Circuit Courts of Appeals, above quoted, seems inescapable. A claim is only contingent where it is uncertain, at petition filed, whether or not there will be a breach. But when the breach has already occurred before bankruptcy and the only uncertainty is the *amount* of damages, this is a question of evidence and merely requires the taking of testimony to liquidate the claim.

It seems clear that this Court had in mind the very situation here involved when it stated in the *Manhattan Properties* case (p. 338):

> "While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. For here, the landlord does not rely upon the destruction of his contract by the bankruptcy; he initiates a new contract of indemnity

> by the affirmative step of re-entry. And this new contract comes into being not by virtue of the bankruptcy proceedings, but by force of the act of re-entry, which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises."

Our adversaries point to the statement of Judge LEARNED HAND writing for the majority in the *Urban Properties* case (p. 656):

> "Rent claims of all sorts are refused recognition merely because they are rent claims, and there is no more to be said about it, except that if wholly free from all uncertainty they are sometimes provable."

It has also been argued that the legislative history of the Bankruptcy Act shows that Congress never intended that any kind of "lease claim" should be provable in bankruptcy. These arguments, which disregard both law and reason, are subject to the same answer: If we are to conclude that *any* claims, which are tainted by arising out of contracts contained in a lease, must be blindly expunged, then how can one account for the *Perry* case which was decided by this Court; how can one account for *In Re Marshall's Garage*, 63 F. (2d) 753 (C. C. A. 2), in which Judge LEARNED HAND participated; how can one account for *In Re Metropolitan Chain Stores*, 66 F. (2d) 485 (C. C. A. 2).

One can readily understand the historical basis for expunging claims for rent as such which are predicated upon covenants real, because from time immemorial it has been the law that bankruptcy does not terminate a lease. But it is difficult to understand any historical basis or to find any authority which necessitates or justifies outlawing claims for damages for breach of personal covenants merely because those covenants or clauses happened to have been written into a document

which once was a lease. To reach such a conclusion this Court must necessarily overrule its recent decision in the *Perry* case. There we had an "independent express contract", just as in the case at bar we have an "independent express contract", and there is no more historical obstacle in the case at bar than there was in the *Perry* case. As in that case, so in the case at bar petitioner's claim is provable under §63 (a).

POINT IV.

Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(B)" of §63 of the bankruptcy act.

The measure of damages for the breach of the independent personal contract is the value of that contract at the time of the breach. In other words, the difference between the total amount of rent that would have been paid under the lease for the balance of the term, less the fair rental value of the premises at the time of bankruptcy, with proper allowance or discount by reason of the fact that there is to be a present cash payment in lieu of periodic payments monthly over a period of years.

Rochm v. *Horst*, 178 U. S. 1, (pp. 20-21), (44 L. Ed. 953);

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811);

In Re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2), (Cert. denied 243 U. S. 635);

Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. 721, 745 (C. C. A. 2);

Leo v. *Pierce Stores Co.*, 57 F. (2d) 340 (D. C. Mich.);
Slater v. *Von Chorus*, 120 App. Div. 16 (N. Y.);
Kalkhoff v. *Nelson*, 60 Minn. 284;
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98;
Reading Iron Works—Sweatman's Appeal, 150 Penn. St. Rep. 369;
Sedgwick on Damages, 9th Ed. §636-d.

The Courts below, both the District Court and the Circuit Court of Appeals, and likewise the Circuit Court of Appeals for the Second Circuit in *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2), and in *Malavazos* v. *Irving Trust Company*, 66 F. (2d) 482 (C. C. A. 2), (Cert. granted 290 U. S. 620), rejected the claims not on the ground that they were contingent, but solely on the ground that the measure of damages was so speculative and uncertain that they were incapable of liquidation under § 63 (b) of the Bankruptcy Act. The Circuit Court of Appeals for the Second Circuit maintained that it is uncertain at the time of bankruptcy whether a reletting over a period of years will in fact result in a profit or a loss to the former landlord, and that since at the time of bankruptcy this cannot be determined with mathematical accuracy, the claimant shall be debarred from filing any claim.

This Court has never used this as a reason for disallowing any landlord's claim and although the Circuit Court of Appeals for the Second Circuit likewise advanced this same argument in its opinion in the *Manhattan Properties* case, this Court, in affirming and disallowing the landlord's claim therein, did so on the ground that the claim was contingent, not on the ground that the damages were speculative.

We can go further. Of the numerous Circuit Court of Appeals decisions in the various Circuits, which have dis-

allowed landlords' claims for future rents, we have found none that base their decision on the ground that the measure of damages was speculative. It would appear that this is a new argument which has been developed in the last few years only by the Circuit Court of Appeals in the Second Circuit, and it appears to have no foundation on authority or precedent. As a matter of fact, this Court has on several occasions ruled otherwise.

In *Roehm* v. *Horst*, 178 U. S. 1 (44 L. Ed. 953), this Court recognized that by allowing the plaintiff an immediate cause of action before the time for final performance had arrived, the Court must rely upon the opinion of experts to estimate the damages plaintiff would incur at the time in the future when performance was due. This Court then held that plaintiff was entitled to recover although liquidation of his damage involved a degree of uncertainty. It stated (p. 21):

> "Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation * * *. Although he (claimant) may receive his money earlier in this way and may gain or lose by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him and the other party cannot complain."

In *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811), this Court was presented with precisely the problem that is now before it. There was involved a license agreement of a hack stand whereby the licensee or tenant was to pay an amount monthly for rent. Bankruptcy breached this agreement. At the time of bankruptcy, just as in the

case at bar, there had as yet been no reletting, and there was no *certainty* of the amount that the landlord would obtain upon reletting. Some time after bankruptcy, just as in the case at bar, the landlord relet at a loss. This Court found no difficulty in allowing the claim despite the fact that at the time of the breach (the date of bankruptcy) it was uncertain whether or not over the balance of years that the agreement had to run the claimant would actually profit or lose. These were contingencies which could be estimated by experts and this Court found them no justifiable cause for debarring the claimant from any relief.

Indeed, Judge LEARNED HAND who wrote the opinion in the *Urban Properties* case, disallowing the claim on the ground that the damages were speculative, himself said in the *Manhattan Properties* case, 66 F. (2d) 470 (p. 471):

> "The uncertainties attendant upon any future instalments were as great (in the *Chicago Auditorium* case) as in the case of a covenant to pay rent under a lease."

Can it be argued that it is more difficult to obtain expert testimony to determine the fair rental value of the leased premises so that the damages suffered by petitioner may be liquidated under § 63 (b) of the Bankruptcy Act with a reasonable degree of accuracy and certainty, than it is to obtain testimony to liquidate with accuracy the many other types of claims which have been held provable under the Bankruptcy Act?

> *In Re Marshall's Garage*, 63 F. (2d) 759 (C. C. A. 2)—Breach of a contract to buy real estate;
>
> *Cobb* v. *Overman*, 109 Fed. 65 (C. C. A. 4)—Breach of an indemnity contract guaranteeing payment of an annuity;

In Re Stern, 116 Fed. 604 (C. C. A. 2)—Anticipatory breach of installment contract to furnish ice;

In Re Schultz & Guthrie, 235 Fed. 907 (D. C. Mass.)—Breach of employee's contract;

In Re Nye, 22 F. (2d) 558 (D. C. Minn.)—Breach of employment contract;

Hayward v. *Goldsmith*, 269 Fed. 946 (C. C. A. 3)—Breach of an indemnity contract;

Portage Rubber Co., 296 Fed. 289 (C. C. A. 6)—Breach of contract to buy rubber;

Carroll Electric Co. v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1)—Breach of warranty in sale of goods.

We go further. The same measure of damages (the difference between the rent reserved and the fair rental value of the premises for the balance of the term of the lease) has been twice allowed by this Court—once in a bankruptcy case and once in an equity receivership case:

Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174);

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597 (62 L. Ed. 497).

Indeed, in the *Filene* case Mr. Justice HOLMES called such measure of damages "familiar and fair". Can it be argued with any conviction that this measure of damages becomes less speculative and less difficult of appraisal when specified as a contractual measure liquidating the damages as in the *Filene* case and in the *Perry* case, than when it is the usual measure of damages created by law? In both situations there are the same uncertainties—whether in the future the former landlord will relet at a profit or loss—and the Bankruptcy Court must go through the same process. It adds up on the one hand the total rental for the balance of the term; it hears

experts testify as to the rental value of the premises. From this evidence it computes the loss in both cases.

We submit that the decision of the Circuit Court of Appeals herein is directly in conflict with the necessary effect of the holdings of this Court in the *Perry* case, the *Filene* case, the *Chicago Auditorium* case and in *Roehm* v. *Horst.*

POINT V.

No tenable arguments have been advanced which justify disallowing petitioner's claim.

Various arguments have been advanced by respondent and by the Courts below urging that petitioner's claim should not be allowed in bankruptcy. Upon analysis each of these arguments is shown to lack merit:

1. *That the claim is contingent and not certain.*

We have shown that petitioner terminated the lease and reentered before bankruptcy. The personal indemnity contract was anticipatorily breached by the bankruptcy and there was a fixed liability which then arose and which was subject to no contingency.

2. *That the tendency of the Courts has been to disallow claims of this type.*

We assert that on the contrary, where the lease was terminated before bankruptcy, every decision, until the decision of the lower Courts herein, allowed the claim.

3. *That legislative history demonstrates that Congress did not contemplate that lease claims should be allowed.*

On the contrary, this Court has conclusively shown by its decision in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174), that so-called landlords' claims, if not contingent, are provable.

4. That the measure of damages is so speculative that petitioner's claim is incapable of liquidation under §63 (b).

We answer that petitioner's damages can be more definitely and accurately determined by experienced experts than many of the unliquidated claims which have for years been allowed as provable under the Bankruptcy Act.

5. That since petitioner's indemnity contract is a forward contract payable in installments over a period of years, petitioner has no rights until the installments become due.

This argument is advanced in an attempt to distinguish the case at bar from the *Perry* case, but by so doing the proponents of such an argument run squarely into the *Chicago Auditorium* case and *Roehm* v. *Horst*, both of which were forward contracts and in both of which cases this Court held that the creditor need not wait until the respective installments became due.

6. That on principle there is no more reason for allowing petitioner's claim than the claim of the landlord in the Manhattan Properties case.

Commencing with the *Chicago Auditorium* case, the law was settled by this Court that a creditor has a provable claim in bankruptcy where an executory installment contract is breached by bankruptcy. Thereafter, as an exception to that rule this Court held in the *Manhattan Properties* case that because bankruptcy does not terminate a lease, the rule of the *Chicago Auditorium* case could not be therein applied. In the case at bar we are not faced with the historical obstacle which required this Court to make an exception in the *Manhattan Properties* case and we revert necessarily to the general rule of law established by the *Chicago Auditorium* case, and which was subsequently followed in the *Perry* case.

IN CONCLUSION, we assert that there is no theory upon which petitioner's claim in the case at bar can be expunged without overruling either the *Chicago Auditorium* case, the *Perry* case, or both. Every argument that has been advanced in opposition is answered directly by one or both of those two cases, from which no escape can be made.

POINT VI.

The order of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

STROOCK & STROOCK,
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SOL. M. STROOCK,
ROBERT D. STEEFEL,
of Counsel.

FILE COPY

OCT 23 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

No. 67.

MORRIS MILLER,

Petitioner,

—against—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT.

IRVING L. ERNST,
LESTER D. MELZER,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Opinions Below 1

Statement of Facts 1

Question Presented 4

Statutes Involved 5

Summary of Argument 6

Argument:

I—Claims for future rent and for damages for breach of lease are not provable in bankruptcy. A provable claim may be founded upon a covenant contained in a lease contract provided that at petition time the fact of loss thereunder is established and such loss is capable of liquidation. The covenant contained in the present lease cannot serve as the basis for a provable claim, as at petition time whether there would be any loss thereunder was contingent upon subsequent events not within the control of the landlord 9

(1) Claims for future rent and for damages for breach of lease are not provable..... 9

(2) Although a lease covenant may give rise to a provable claim, the basis of the allowance of the claim is the stipulation of the covenant, and not that the claim is based on *an* independent covenant..... 10

(3) The stipulation of the present covenant does not provide for a measure of damages, but for indemnification after bankruptcy, contingent upon uncontrollable events occurring after bankruptcy..... 12

PAGE

II—The present covenant is a contract for the payment of money, and the doctrine of anticipatory breach does not apply to such contracts. In any event, although the present value of a contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant "because of the diversity betweene duties which touch the realty and meere personalty" 18

(1) The covenant is a contract for the payment of money only, to which the doctrine of anticipatory breach does not apply..... 18

(2) Although the value of the contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant, "because of the diversity betweene the duties which touch the realty and the meere personalty" 21

III—The situation presented in the instant case is identical with that in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* with one exception—in the *Manhattan Properties* case there had been no reentry before bankruptcy, whereas, here petitioner had reentered. The fact that the landlord had not reentered prior to bankruptcy was not necessary to the decision in the *Manhattan Properties* case, and upon the authority of that case the order below sustaining the disallowance of the claim must be affirmed..... 25

IV—The decision of the Court of Appeals for the Second Circuit, sustaining the disallowance of the claim should be affirmed..... 28

TABLE OF CASES CITED:

	PAGE
A. W. Perry Inc. v. Irving Trust Company, 69 Fed. (2nd) 90	15
Ambler Garage Inc. v. People, 235 A. D. 548 (N. Y.)	20
Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581	7, 8, 10, 22, 23
Gardiner v. Butler, 245 U. S. 603	8, 11, 21
Hermitage Co. v. Levine, 248 N. Y. 333	7, 17, 21
In re F. & W. Grand 5-10-25 Cent Stores, Inc., 69 Fed. (2nd) 807 (C. C. A. 2)	24
In re F. & W. Grand 5-10-25 Cent Stores, 74 Fed. (2nd) 654 (C. C. A. 2)	4
In re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2)	24
In re Roth & Appel, 181 Fed. 667 (C. C. A. 2)	16
Irving Trust Company v. A. W. Perry, Inc., 293 U. S. 320	4, 6, 10, 11, 12, 14, 15, 17, 22, 23
Kalkhoff v. Nelson, 60 Minn. 284	24
Kelly v. Security Mutual Life Insurance Co., 186 N. Y. 16	20
Leo v. Pierce Stores Co., 57 Fed. (2nd) 340 (D. C. Mich.)	24
Lloyd Investment Co. v. Schmidt, 66 Fed. (2nd) 371 (C. C. A. 7)	24
Malavazos v. Irving Trust Co., 66 Fed. (2nd) 482	24
Manhattan Properties, Inc. v. Irving Trust Company, 291 U. S. 320	2, 4, 6, 8, 9, 10, 11, 21, 24, 25, 26, 27, 28
Marshall & Ilsley Bank v. Irving Trust Company, 70 Fed. (2nd) 691 (C. C. A. 2) certiorari denied, 293 U. S. 590	23
Matter of Hevenor, 144 N. Y. 271	6, 16
Maynard v. Elliott, 283 U. S. 273	7, 15, 16
McCready v. Lindenborn, 172 N. Y. 400	6, 7, 13, 20, 21
Minneapolis Baseball Co. v. City Bank, 74 Minn. 98	24
Pennsylvania Steel Co. v. New York City Railway Co., 198 Fed. 721 (C. C. A. 2)	23

PAGE

Reading Iron Works—Sweatman's Appeal, 150 Penn. St. Rep. 369..... 24
Rochm v. *Horst*, 178 U. S. 1.....7, 19, 23

T. A. D. Jones v. *Winchester*, 61 Fed. (2nd) 774 (C. C. A. 2)..... 24

Urban Properties Co. v. *Irving Trust Company*, 74 Fed. (2nd) 654 (C. C. A. 2)..... 24

Werner v. *Werner*, 169 A. D. 9 (N. Y.)..... 20
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597..11, 14, 22, 23
Williams v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549..... 16

TABLE OF STATUTES CITED:

Bankruptcy Act of July 1, 1898 (30 Stat. 562, as amended; U. S. C. Title 11):

Section 1(11) (U. S. C. Title 11, Section 1)..... 5
Section 17 (U. S. C. Title 11, Section 35)..... 5
Section 63 (U. S. C. Title 11, Section 103)..... 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

No. 67.

MORRIS MILLER,

Petitioner,

—against—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT.

Opinions Below.

The opinion of the Referee (Honorable Oscar W. Ehrhorn) (R. 38) is not reported in the Federal Reporter or Supplement.

The opinion of the District Court (per Hulbert, J.) (R. 43-48) is reported at 10 F. Supp. 733.

The memorandum opinion of the Court of Appeals for the Second Circuit (R. 52) is reported at 77 Fed. (2) 1012.

Statement of Facts.

In 1928 the petitioner, Morris Miller, entered into a written lease with the bankrupt, Sarnoff-Irving Hat Stores, Inc., wherein petitioner leased

to the bankrupt certain premises at 203 Springfield Avenue, Newark, New Jersey, for a term commencing August 1st, 1928 and ending July 31st, 1938, at an annual rental of $4500 for the first two years of the term, $5000 for the next three years and $5500 for the balance of the term, payable in equal monthly installments (R. 5-12).

The lease contained a covenant continuing the liability of the tenant to the end of the original term, in the event of the sooner termination of the lease by the landlord, by reason of certain defaults of the tenant. This covenant provided that upon such termination of the lease *the tenant shall pay to the landlord during the balance of the original term the deficiency between the rent reserved in the lease and the avails of reletting, as such deficiency shall accrue from month to month* (R. 7), and was similar in all pertinent respects to the indemnity covenant considered in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320. The tenant, the bankrupt herein, entered and took possession of the premises and remained in possession until April 27th, 1932, upon which day an Equity Receiver of all the property of the bankrupt was appointed by the United States District Court for the Southern District of New York, and took possession of the premises (R. 20). The Equity Receiver disaffirmed the lease on June 1st, 1932 and vacated the premises on July 18th, 1932 (R. 21). Petitioner, the landlord, reentered the premises and took possession thereof on July 25th, 1932 (R. 21).

On August 27th, 1932 the bankrupt, Sarnoff-Irving Hat Stores, Inc., filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, and was adjudicated a bankrupt on the same day (R. 21). The respondent is the trustee in bankruptcy of the said bankrupt.

The petitioner thereupon filed his proof of claim in the bankruptcy proceeding for $16,625 (R. 1-4), which amount petitioner arrives at in the following manner:

(a) Rent for the months of March and April, 1932, at the rate of $300.00 per month, in all amounting to the sum of	$600.00
(b) The sum of $16,025.00, representing the difference between the rent reserved in said lease for a period beginning with May 1st, 1932, and ending July 31st, 1938, amounting to the sum of $32,000.00, and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	16,025.00
Total	$16,625.00 (R. 2)

Respondent, as trustee in bankruptcy, objected to all of the claim except $1000, which represents the rental deficiencies accrued at the date of the filing of the bankruptcy petition (R. 17), and the referee in bankruptcy sustained the objection and reduced the claim to $400 ($600 having been paid petitioner by the respondent under the New Jersey priority statute) (R. 37-38).

The balance of the claim, which was disallowed and expunged by the referee, was for the difference between the rent reserved in the lease and the reasonable rental value of the premises from the date of

the bankruptcy petition to the date specified in the lease for the termination thereof, which petitioner demands under the above referred to indemnity covenant contained in the lease. Although this balance of the claim (to which we shall hereafter refer as the claim) is the same as that allowed by this court in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, it is based on a covenant entirely dissimilar from the one contained in the lease in the *Perry* case, and the same in all pertinent respects with the lease covenant in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* where the claim was held not provable.

The correctness of the liquidation of the claim is not here involved, the parties having stipulated before the referee that the determination of the amount of petitioner's damages and the liquidation of his claim be reserved pending determination of the primary question—whether the claim of the petitioner is one provable in bankruptcy (R. 19-20).

The order of the referee disallowing the claim was affirmed by the District Court for the Southern District of New York (R. 42), with opinion by Judge Murray Hulbert (R. 43-48), reported at 10 F. Supp. 733, and by the Court of Appeals for the Second Circuit, with a memorandum opinion (R. 52-53) reported at 77 Fed. (2nd) 1012. The memorandum opinion of the Court of Appeals for the Second Circuit affirmed the orders below on authority of *In re F. & W. Grand 5-10-25 Cent Stores,* 74 Fed. (2nd) 654 (C. C. A. 2). Certiorari was granted by this court June 3rd, 1935.

Question Presented.

Is a claim for rent deficiencies which may accrue subsequent to the filing of a petition in bankruptcy based upon a covenant contained in a lease of real

estate wherein it is provided that the tenant shall pay to the landlord the deficiency between the rents reserved in the lease and the avails of re-letting, as such deficiency shall accrue from month to month, provable in bankruptcy?

Statutes Involved.

Section 63 of the Bankruptcy Act provides:

> "Debts which may be proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

> "'debt' shall include any debt, demand or claim provable in bankruptcy;"

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts" * * * with exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35 and 103.)

Summary of Argument.

I.

Claims for future rent and for damages for breach of lease are not provable in bankruptcy. *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320.

Although a covenant contained in a lease may give rise to a provable claim where it is stipulated in the covenant that upon bankruptcy the landlord shall be entitled to receive as damages the difference between the rents reserved in the lease and the rental value to the end of the term, *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, the basis of the allowance of the claim is the stipulation contained in the covenant and not that the claim is based on *an* independent covenant rather than the lease itself.

The present covenant provides that the tenant shall pay to the landlord the deficiency between the rents reserved in the lease and the avails of reletting, as such deficiency shall accrue from month to month. Therefore, pursuant to the stipulation of *this* covenant, whether or not there would be any loss was contingent upon events which could happen only after petition time. At petition time not only was the *amount* of loss uncertain, but also the *fact* of loss under the covenant.

Claims for the difference between the rents reserved in the lease and the rental value of the premises, based upon covenants similar in all pertinent respects to the present one, were held not maintainable.

McCready v. *Lindenborn*, 172 N. Y. 400;
and
Matter of Hevenor, 144 N. Y. 271.

The contingencies of petitioner's claim are not within his control, but are uncontrollable events happening after bankruptcy and bar the proof of the claim. *Maynard* v. *Elliott,* 283 U. S. 273.

> "If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of the tenant whose liability for the future ended with the cancellation of the lease, except in so far as he bound himself by covenant to liability thereafter." *Hermitage Co.* v. *Levine,* 248 N. Y. 333, 338-339.

II.

The basis of petitioner's claim is that at petition time the lease had already been terminated, the only liability of the tenant surviving this termination being upon the indemnity covenant which was anticipatorily breached by the filing of the bankruptcy petition, entitling petitioner to the difference between the rents reserved in the lease and the rental value of the premises to the end of the original term. *The defects in the argument are* (in addition to those discussed under Point I):

1. *The indemnity covenant is a contract for the payment of money and the doctrine of anticipatory breach does not apply to such contracts. A covenant similar in all pertinent respects was held not subject to the doctrine in McCready* v. *Lindenborn,* 172 N. Y. 400.

This limitation of the doctrine was recognized in Central Trust Company v. *Chicago Auditorium Association,* 240 U. S. 581, *and Roehm* v. *Horst,* 178 U. S. 1.

2. *The measure of damages applied by petitioner, although applicable to the breach of ordinary contracts, is not applicable here, the historical distinction between covenants relating to realty and personalty having been adhered to by this Court, and the only liability of a tenant surviving the termination of a lease being on the covenant, which in this case relates to the realty—the future fruits of the demised premises.*

Gardiner v. *Butler*, 245 U. S. 603;
Central Trust Co. v. *Chicago Auditorium Association*, *supra*.

III.

The situation presented in the instant case is precisely the same as that in *Manhattan Properties* v. *Irving Trust Company*, *supra*—the covenants in both cases being similar in all pertinent respects—with the one exception, that in the latter case there had been no reentry prior to petition time, while in the present case, the landlord had reentered prior to petition time.

The fact that the landlord had not reentered at petition time in the *Manhattan Properties* case was not necessary to the decision, and the authority of that case demands affirmance of the order below.

Argument.

I.

Claims for future rent and for damages for breach of lease are not provable in bankruptcy. A provable claim may be founded upon a covenant contained in a lease contract provided that at petition time the fact of loss thereunder is established and such loss is capable of liquidation. The covenant contained in the present lease cannot serve as the basis for a provable claim, as at petition time whether there would be any loss thereunder was contingent upon subsequent events not within the control of the landlord.

(1) *Claims for future rent and for damages for breach of lease are not provable.*

The question here presented involves no principle of law that has not been already established by this Court. The general question of the provability in bankruptcy of claims for future rent and for damages for breach of lease and failure to pay rent was presented in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320, where this Court held that all such claims were not provable. In that case Mr. Justice Roberts, writing for the Court, stated at page 335, referring to the present Bankruptcy Act:

> "In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision *for claims for loss of rent or for damages consequent on the abrogation of leases,* is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra* (251 U. S. pp. 250, 251, 64 L. ed. 252, 253, 40 S. Ct. 135, 45 Am. Bankr. Rep. 599).
>
> Soon after the passage of the Act several

federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under §63."

And at page 336:

"What of the activities of the Congress while this body of decisions interpreting §63a was growing? From 1898 to 1932 the Bankruptcy Act was amended eight times without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 S. Ct. 914.

In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted'. *Maynard* v. *Elliott, supra* (283 U. S. 277, 75 L. ed. 1031, 51 S. Ct. 390, 17 Am. Bankr. Rep. (N. S.) 501.) If the rule is to be changed Congress should so declare." (Italics supplied.)

(2) *Although a lease covenant may give rise to a provable claim, the basis of the allowance of the claim is the stipulation of the covenant, and not that the claim is based on an independent covenant.*

The principle of the *Manhattan Properties* case was in no wise narrowed by the decision in *Irving Trust Company* v. *A. W. Perry, Inc.,* 293 U. S. 320, where this Court held provable in bankruptcy a claim based upon a covenant providing that bankruptcy should be a breach of the lease, and the consequent damages to the lessor measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. In concluding his opinion in the *Manhattan Properties*

case, Mr. Justice Roberts stated with reference to the indemnity covenant in the lease there involved:

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future" (pp. 338-339).

The decision in the *Perry* case is in thorough harmony and complete accord with that in the *Manhattan Properties* case. The covenant in the *Perry* case provided a fair formula for the estimation of the damage—the difference between the present value of the remainder of the term and the total rent to fall due in the future—and since the prescribed measure of damages did not sound in penalty, it was enforcible. Such a covenant twice before had been held by this Court to serve as the basis for proving a claim in an equity receivership.

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597;
Gardiner v. *William S. Butler & Co., Inc.*, 245 U. S. 603.

The landlord in the *Perry* case, by virtue of the independent express covenant in the lease contract, at the moment of the filing of the bankruptcy petition, was possessed of a cause of action at law against the tenant for the then value of the difference between the rent reserved in the lease to the end of the term, and the rental value of the demised premises for the same period. There was no question as to whether the landlord would suffer any actual loss. The actual amount for which the landlord might subsequently relet the premises was immaterial. By express contract the parties liquidated the damage

upon a fair basis, and stipulated that the landlord was immediately entitled to receive this sum upon the termination of the lease. This Court did not provide a measure of damages for the breach, but merely enforced the measure of damages stipulated in the covenant by the parties, stating:

> "We concur in the view that the contract, as its terms were interpreted and applied (by the court below), supports a provable claim for the stipulated damages."

(3) *The stipulation of the present covenant does not provide for a measure of damages, but for indemnification after bankruptcy, contingent upon uncontrollable events occurring after bankruptcy.*

The stipulation in the instant lease is otherwise. The covenant provides that in the event of the termination of the lease the tenant shall pay to the landlord *the deficiency between the rent reserved and the avails of re-letting, as such deficiency shall accrue from month to month* (R. 7). At the time of the filing of the bankruptcy petition there was no amount due the landlord, pursuant to this covenant, *and no amount might ever become due thereunder.* Unlike the covenant in the *Perry* case, which gave the landlord immediately upon the termination of the lease a single and immediate cause of action for the difference between the rent reserved in the lease to the end of the term and the rental value of the premises, the covenant in the present lease gave the landlord no cause of action upon the termination of the lease. Under this covenant a separate and independent cause of action would arise each month subsequent to termination, in which a deficiency should actually occur, *but whether such deficiency would occur and if so, the amount thereof, was uncertain at petition time.*

In *McCready* v. *Lindenborn*, 172 N. Y. 400, exactly the same situation was presented to the Court of Appeals of the State of New York. There the covenant in the lease read substantially the same as the present one—it provided that upon certain defaults of the tenant the landlord might reenter and terminate the lease, whereupon the tenant should pay to the landlord monthly the difference between the rent reserved in the lease and the avails of reletting. Default was made by the tenant, whereupon the landlord exercised his option and reentered the premises and terminated the lease. The landlord then instituted suit against the tenant, before the expiration of the original term, for the difference between the rent reserved in the lease to the end of the term and the rental value of the premises—the precise position here taken by the petitioner. The Court held that the action was not maintainable; that a single cause of action for the difference between the rent reserved and the rental value to the end of the original term did not arise, saying at pages 406-407:

> "One unbroken covenant survived re-entry, because it provided expressly for that contingency by authorizing the lessor to relet the premises and requiring the lessee to pay any deficiency in equal monthly payments as the amount thereof should, from month to month, be ascertained by deducting from the rent reserved the rents received, less the expense of such repairs as the tenant covenanted to make and less also, as is reasonably to be implied from authority to relet, the reasonable expenses of reletting and collecting. *By the express contract of the parties a separate and independent cause of action arose under this covenant every month when there was a deficiency ascertained in the manner provided.* The plaintiff was at

liberty to allow the causes of action for monthly deficiency to accumulate and to recover upon several at the same time, *but she could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant.*" (Italics supplied.)

Likewise, the present petitioner, whose claim is based upon a covenant similar in all pertinent respects "could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant". At petition time the deficiency which might accrue in the future obviously had not already accrued. The covenant prescribed the mode of ascertaining the deficiency—the difference between the rent reserved and the actual avails of reletting, not a guess as to the probable future fruits of the demised premises. And at petition time it was uncertain whether there would ever be any deficiency, as such deficiency could be ascertained only by events happening subsequent to petition time.

Petitioner argues under Point IV of his brief that his damage was capable of liquidation—that the measure of damages for the breach was the difference between the total amount of rent reserved in the lease to the end of the original term and the rental value of the premises for the same period, and refers to this Court's decisions in *Irving Trust Company* v. *A. W. Perry, Inc., supra,* and *Wm. Filene's Sons Co.* v. *Weed, supra,* in pointing out the fairness of the measure. Petitioner, however, loses sight of the fact that in both these cases this measure had been agreed upon by the parties to the lease, and this Court was not applying or fixing a measure of damages for the breach, but merely enforcing a valid stipulation expressly made by the parties themselves. Petitioner incorrectly urges that the basis upon which the objection to the provability of the claim is founded, is that

the damages cannot be ascertained with mathematical certainty. *The basis of the objection is that at petition time it was uncertain whether there would actually be any loss.*

The language of Circuit Judge Learned Hand, in writing the opinion for the Court of Appeals for the Second Circuit, in *A. W. Perry, Inc.* v. *Irving Trust Company,* 69 Fed. (2nd) 90, affirmed with opinion, 293 U. S. 320 readily exposes the fallacy of petitioner's argument:

> "It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections. But where the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the Bankruptcy Court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable" (p. 91).

While it is true that contingent claims may be provable in bankruptcy, this is so only where the contingency is within the control of the creditor. In *Maynard* v. *Elliott,* 283 U. S. 273, it was urged by the trustee in bankruptcy that the claim against the bankrupt endorsers upon promissory notes unmatured at the date of bankruptcy was not provable, as the accrual of any indebtedness against the bankrupt endorsers was contingent upon notice of dishonor being given at maturity, which would be subsequent to the time of the filing of the bankruptcy petition. This court allowed the claim stating with regard to the contingency—"and the contingency of notice of dishonor to the endorser is *within the control of the creditor*" (278). (Italics supplied.) Likewise in

Williams v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, there was no contingency not within the control of the creditor.

And in *Maynard* v. *Elliott, supra,* it was specifically pointed out that "The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof" (278). *The claim of the present petitioner is dependent upon the rents actually received by him subsequent to petition time, as pursuant to the stipulation of the covenant the amount thereof must be deducted from the rents reserved in the lease in order to determine the fact and the amount of loss.* The contingencies of the bankrupt's obligation are not within the control of the petitioner and are precisely the same contingencies which bar a claim for future rent.

See:

In re Roth & Appel, 181 Fed. 667 (C. C. A. 2).

A similar situation was presented in *Matter of Hevenor,* 144 N. Y. 271, where the Court of Appeals of New York State held:

> "The effect of exercising the latter option (to enter and re-let the premises) was to terminate the agreement to pay the monthly rent and, thereafter, to leave the matter of any liability of the lessee to them contingent upon the success which the lessors might meet with, in re-letting the premises; a liability which, if it arose, could only be finally and definitely ascertained at the expiration of the demised term; while it might not arise at all.
>
> Under such circumstances, what claim these appellants could have against the assignor, or his assigned estate, must be uncertain and contingent" (273).

It is argued by the petitioner under Point I of his brief that upon the termination of the lease the relationship of landlord and tenant ceased, the only surviving liability of the bankrupt being upon the indemnity covenant. This rule of law is too well-settled to permit of argument. The claim of petitioner is based upon this indemnity covenant which clearly describes the surviving liability—*to pay the deficiency between the rent reserved in the lease and the avails of reletting as such deficiency shall accrue from month to month.* The petitioner stipulated that his damage be ascertained every month upon the basis of that month's reletting, and expressly made the bankrupt's surviving liability contingent upon the future rents. The petitioner did *not* stipulate as did the landlord in *Irving Trust Company* v. *A. W. Perry, Inc.*, that the tenant's liability be fixed immediately upon the termination of the lease by deducting, from the rents reserved in the lease to the end of the term, the rental *value* of the premises for a like period. As was said by Mr. Justice Cardozo (then Chief Judge of the Court of Appeals of New York State) in *Hermitage Co.* v. *Levine*, 248 N. Y. 333:

> "If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of the tenant whose liability for the future ended with the cancellation of the lease, except in so far as he bound himself by covenant to liability thereafter" (pp. 338-339).

II.

The present covenant is a contract for the payment of money, and the doctrine of anticipatory breach does not apply to such contracts. In any event, although the present value of a contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant "because of the diversity betweene duties which touch the realty and the meere personalty".

The basis of petitioner's argument in support of the provability of his claim is:

> 1. Prior to petition time the landlord reentered, thus terminating the lease. The covenant in the lease requiring the tenant to pay monthly the difference between the rent reserved and the avails of reletting during the balance of the term survived the termination of the lease (Point I, Petitioner's Brief, p. 6).
>
> 2. The filing of the bankruptcy petition constituted an anticipatory breach of this covenant by the tenant and immediately entitled the landlord to the then value of the contract, which was the difference between the rent reserved and the rental value of the premises to the end of the term (Points II and III, Petitioner's Brief, pp. 7 to 15).

(1) *The covenant is a contract for the payment of money only, to which the doctrine of anticipatory breach does not apply.*

The difficulty with petitioner's position is that the filing of the bankruptcy petition did not constitute an anticipatory breach of this covenant. It is not every contract to which the doctrine of anticipatory breach is applicable, and the decisions of this Court cited by petitioner so declare.

Central Trust Company v. *Chicago Auditorium Association,* 240 U. S. 581;
Roehm v. *Horst,* 178 U. S. 1.

The principle of anticipatory breach was recognized by this Court in *Roehm* v. *Horst, supra, as was also the limitation of the principle.* At page 17 Chief Justice Fuller pointed out:

> "In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

And at page 18:

> "We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand at a different footing from executory contracts for the purchase and sale of goods."

In *Central Trust Company* v. *Chicago Auditorium Association, supra,* this Court held that bankruptcy constituted an anticipatory breach not of every contract, but of such contracts to which the doctrine of anticipatory breach was applicable. Here again the limitations of the doctrine were recognized, this Court stating at page 589:

> "Coming to the merits: It is no longer open to question in this Court, that as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anti-

cipatory breach. *The rule has its exceptions, but none that now concerns us.*" (Italics supplied.)

In *McCready* v. *Lindenborn,* 172 N. Y. 400, to which we have heretofore adverted, the precise question here involved was presented. The covenant read substantially the same as the present one, obligating the tenant, upon the termination of the lease by reason of his default, to pay to the landlord monthly, the difference between the rent reserved and the avails of reletting for the balance of the term. Subsequent to the termination of the lease by the landlord because of the default of the tenant, and prior to the expiration of the balance of the term, the latter breached the indemnity covenant by defaulting in making payment of the monthly deficiencies when due, whereupon the landlord instituted suit for the difference between the rent reserved in the original lease and the rental value, to the end of the term, upon the theory that the failure of the tenant to perform the terms of the indemnity covenant constituted an anticipatory breach of the covenant. The Court of Appeals held the doctrine of anticipatory breach inapplicable, stating at page 408:

> "The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance. (*Wharton & Co.* v. *Winch,* 140 N. Y. 287; *Moore* v. *Taylor,* 42 Hun 45.)"

And to the same effect:

> *Kelly* v. *Security Mutual Life Insurance Co.,* 186 N. Y. 16;
> *Ambler Garage Inc.* v. *People,* 235 App. Div. 548 (N. Y.);
> *Werner* v. *Werner,* 169 App. Div. 9 (N. Y.).

The obligation of the bankrupt under the covenant was simply to pay money in installments, and the doctrine of anticipatory breach not being applicable to such a contract, the filing of the bankruptcy petition could not and did not act as a breach of the covenant. The covenant gave rise to a separate and independent cause of action every month during the balance of the term when and if there was a deficiency ascertained in the manner provided.

McCready v. *Lindenborn, supra.*

At the time of bankruptcy these causes of action had not arisen—nor might they ever arise—and consequently, there was no basis upon which a claim in bankruptcy could be founded.

(2) *Although the value of a contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant, "because of the diversity betweene the duties which touch the realty and the meere personalty".*

Upon the termination of a lease of real estate, the relationship of landlord and tenant is at an end, and no liability survives this termination, except by express covenant. And where a covenant in the lease provides for liability of the tenant surviving the termination of the lease, the nature and extent of that liability is confined to the stipulation of the covenant.

Gardiner v. *Butler, supra*;
Manhattan Properties v. *Irving Trust Company, supra*;
McCready v. *Lindenborn, supra*;
Hermitage Co. v. *Levine, supra.*

Gardiner v. *Butler, supra,* presents an interesting contrast between the law of real estate and personal property, and is a complete answer to petitioner's

argument that the ordinary measure of damages—the present value of the contract, which is the difference between the rent reserved and the rental value to the end of the term—applies. There the provability of two lease claims in equity receivership was involved: The first claim was based on a covenant similar to that in *Wm. Filene's Sons Co.* v. *Weed, supra,* and *Irving Trust Company* v. *A. W. Perry, Inc., supra,* wherein a measure of damages for breach of lease was expressly stipulated—the difference between the rent reserved to the end of the original term, and the rental value of the premises. The second claim was merely for damages resulting from the breach of the lease—the claimant contending that he lost the benefit of his bargain and was therefore entitled to recover his loss, which was the value of his contract. In allowing the first claim and disallowing the second, Mr. Justice Holmes wrote:

> "The second claim is upon a lease by Russell to the same Company of which Gardiner had purchased the reversion. In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reentry, the lease not containing any clause stipulating for such an allowance. *Of course, there are plausible analogies for the contention. But the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke*" (605). (Italics supplied.)

This historical, albeit not logical distinction between the law of real estate and that of personal property was also commented upon by this Court in *Central Trust Company* v. *Chicago Auditorium Association, supra,* where it was observed:

> "Cases of the latter class are distinguishable

because of the 'diversity betweene duties which touch the realty, and the meere personalty'. Co. Litt. 292b, §513" (590).

Despite the fact that the lease may have been terminated prior to the filing of the bankruptcy petition, the covenant upon which the instant claim is based nevertheless relates to realty—the premises demised in the lease. The stipulation of the covenant is that the tenant will pay monthly the deficiency, if any, on the reletting of the demised premises. In other words, the obligation of the tenant is one of guaranty that the landlord will relet the premises and collect monthly from the new tenant, rent, which shall not be less than that reserved in the original lease. But no matter how the covenant is viewed, the conclusion is inescapable that the loss of the landlord is dependent on the rents he receives in the future from the demised premises, and the reasons precluding the proof of claims for future rent obtain here.

See:

Marshall & Ilsley Bank v. *Irving Trust Company,* 70 Fed. (2nd) 691 (C. C. A. 2), certiorari denied, 293 U. S. 590.

The cases cited by petitioner in support of his contention that this measure of damages is applicable, deal with contracts relating to personal property, *Roehm* v. *Horst, supra; Central Trust Company* v. *Chicago Auditorium Association, supra; Pennsylvania Steel Co.* v. *New York City Railway Co.,* 198 Fed. 721 (C. C. A. 2); with covenants expressly providing for the measure, *Irving Trust Company* v. *A. W. Perry, Inc., supra; Wm. Filene's Sons Co.* v. *Weed, supra;* or with covenants dealing with leases of real estate in states where courts have not adhered to this historical distinction between covenants re-

lating to personalty and realty, *Leo v. Pierce Stores Co.*, 57 Fed. (2nd) 340 (D. C. Mich.); *Kalkhoff* v. *Nelson*, 60 Minn. 284; *Minneapolis Baseball Co.* v. *City Bank*, 74 Minn. 98; *Reading Iron Works—Sweatman's Appeal*, 150 Penn. St. Rep. 369.

Petitioner also cites in support of the provability of his claim *In re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2), and *Lloyd Investment Co.* v. *Schmidt*, 66 Fed. (2nd) 371 (C. C. A. 7). The former case was thrice disapproved by the same court which rendered the decision.

> *T. A. D. Jones* v. *Winchester*, 61 Fed. (2nd) 774 (C. C. A. 2);
> *Malavazos* v. *Irving Trust Co.*, 66 Fed. (2nd) 482; and
> *In re F. & W. Grand 5-10-25 Cent Stores, Inc.*, 69 Fed. (2nd) 807 (C. C. A. 2);

and later expressly overruled by that court.

> *Urban Properties Co.* v. *Irving Trust Company*, 74 Fed. (2nd) 654 (C. C. A. 2).

The decision of the Court of Appeals for the Seventh Circuit, in *Lloyd Investment Co.* v. *Schmidt, supra*, was based upon that of the Second Circuit in *In re Mullings Clothing Co., supra*, and the reasoning of both cases fell with this Court's decision in the *Manhattan Properties* case.

In *Urban Properties Co.* v. *Irving Trust Company, supra*, equity receivers were appointed prior to bankruptcy, and disaffirmed the lease before the commencement of the demised term. The landlord sought to prove a claim in the subsequent bankruptcy proceeding for the difference between the rents reserved in the lease, and the rental value of the premises, although the covenant contained no such stipulation,

but provided—as does the instant covenant—that the tenant shall pay the deficiency between the rent reserved and the avails of reletting, monthly. The Court of Appeals for the Second Circuit, in disallowing the claim, stated:

> "and that uncertainty (amount of loss) is as great when the lessee has not entered, as when he has; perhaps more. Nobody can tell in either case how long the term would have lasted or how many installments would ever have become due. True, that uncertainty is no greater than the law has met and answered in other situations, but the doctrine is based in history not logic" (656).

III.

The situation presented in the instant case is identical with that in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* with one exception—in the *Manhattan Properties* case there had been no reentry before bankruptcy, whereas, here petitioner had reentered. The fact that the landlord had not reentered prior to bankruptcy was not necessary to the decision in the *Manhattan Properties* case, and upon the authority of that case the order below sustaining the disallowance of the claim must be affirmed.

The claim of petitioner is based upon an indemnity covenant similar in all pertinent respects to the indemnity covenant considered by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.* The situations in both cases are identical—with one exception. In the *Manhattan Properties* case the landlord had not reentered at petition time, whereas the present petitioner had reentered the premises prior to the date of the filing of the bankruptcy petition.

The inquiry therefore is whether the fact that the landlord had not reentered at the time of the filing of the petition in the *Manhattan Properties* case was necessary to the decision of the case—if it was not, the instant claim must be disallowed on the authority of the *Manhattan Properties* case.

In that case the question presented was whether a landlord might prove in bankruptcy for loss of rents payable in the future, and in the alternative, whether a landlord might prove in bankruptcy upon the indemnity covenants contained in the leases (the opinion embraced two cases). After holding that the claim in so far as it was for loss of future rents based upon the rent covenant was not provable, this Court went on to consider the effect of the indemnity covenants, Mr. Justice Roberts, writing for the Court, stating at page 337:

> "It remains to consider the effect of the indemnity covenants in the leases. These do not provide for liquidation of damages (compare *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 62 L. ed. 497, 38 S. Ct. 211, 41 Am. Bankr. Rep. 18, *supra*), nor indeed for any right to damages for breach of covenant to pay rent."

The covenant in the first of the cases, Number 505, was substantially the same as the present covenant—the tenant agreed to pay each month the deficit accruing between the amount to be paid as rent under the lease and the amount received by the landlord from the premises throughout the residue of the original term. In the second case, Number 506, the tenant agreed that "it would indemnify the lessor against all loss of rent which the lessor may incur by reason of such termination during the residue of the term" (pp. 337-338).

After describing these covenants, Mr. Justice Roberts pointed out that the contract of indemnity is initiated by the act of reentry, and that until the reentry is made by the landlord, the contract of indemnity is not initiated; since no reentry was made by the landlord prior to the filing of the petition, at petition time the contract of indemnity had not come into being.

But the matter did not rest there. The opinion went on to show that in no event could the contracts of indemnity, even though they had been initiated prior to petition time, serve as a basis for a provable claim, *since the expiration date specified in the lease had not yet arrived*:

> "Obviously, this contract of indemnity is not breached by bankruptcy, *and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term*" (338). (Italics supplied.)

And even had the contract of indemnity been initiated prior to the filing of the petition by an act of reentry, it would not have been breached by the bankruptcy, since the doctrine of anticipatory breach is not applicable to this contract (Point II of this Brief, pp. 18-21). Whether the contract of indemnity was or was not initiated at petition time by a reentry of the landlord was immaterial—*in either event, that contract could not be breached until the duty of indemnifying the landlord arose, and that duty could not be complete until the expiration of the original term.*

The contract of indemnity in the *Manhattan Properties* case was held to be incapable of supporting a proof of claim in bankruptcy for two reasons:

1. The contract of indemnity had not been

initiated at petition time, since there had been no reentry; and

2. The contract of indemnity could not be breached until the duty of indemnifying arose, and that duty could not be complete until the expiration of the term. Fulfillment of the contract was therefore contingent upon events which would occur subsequent to the filing of the bankruptcy petition.

"There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option, and after the inception of the proceedings, *the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term"* (p. 338). (Italics supplied.)

The fact that there had not been a reentry prior to petition time was not necessary to the decision. Even had the contract of indemnity been initiated at petition time, the contract would nevertheless have been one "the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term". Since the present claim is identical with those involved in the *Manhattan Properties* case, except for the reentry prior to petition time, this case is ruled by the *Manhattan Properties* decision, and the order below sustaining the disallowance of the claim must be affirmed.

IV.

The decision of the Court of Appeals for the Second Circuit, sustaining the disallowance of the claim should be affirmed.

Respectfully submitted,

IRVING L. ERNST,
LESTER D. MELZER,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1935.

Morris Miller, Petitioner,
vs.
Irving Trust Company, as Trustee in Bankruptcy of Saranoff-Irving Hat Stores, Inc., Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 9, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

The question is as to provability of a claim growing out of the termination of a lease by petitioner to the bankrupt and reentry before lessee filed his petition in voluntary bankruptcy. There is involved a construction of §§ 1 (11), 17 and 63 (a) (b) of the Bankruptcy Act.* The District Court for the Southern District of New York held the claim not provable. 10 F. Supp. 733. The Circuit Court of Appeals affirmed, 77 F. (2d) 1012, following its decision in *Urban Properties Co.* v. *Irving Trust Co.*, 74 F. (2d) 654, in which we granted a writ of certiorari, 295 U. S. 725, dismissed on petitioner's motion. 296 U. S. —. The decision in the case now before us conflicts with that of the Circuit Court of Appeals for the Seventh Circuit in *Lloyd Inv. Co.* v. *Schmidt*, 66 F. (2d) 371. To resolve the conflict we granted this writ. 295 U. S. 729.

The lease covered a store building in Newark, New Jersey, and was for a term of ten years commencing August 1, 1928. The lessee occupied the premises until April 27, 1932, when, by the above

*Section 1 (11). "'debt' shall include any debt, demand, or claim provable in bankruptcy". 11 U. S. C., § 1 (11).

Section 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . ". 11 U. S. C., § 35.

Section 63. "*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) . . . fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied. . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." 11 U. S. C., § 103.

named court, an equity receiver was appointed for it. The receiver, having disaffirmed the lease, vacated the premises July 18, and the lessor took possession July 25; the lessee filed its petition in bankruptcy August 27. Later, the lessor relet the premises for the balance of the term but for rents less than those reserved in the lease to the bankrupt.

That lease provides that, if the premises shall become vacant or the term shall end prior to the expiration date because of any act of the tenant, the landlord may reenter, relet the premises and apply the rents received on the reletting to the payments of rents due under the lease, and that the tenant shall not be entitled to any surplus, but shall remain liable for any deficiency which, at the option of the landlord, shall become payable on demand or as it accrues from month to month.

The petitioner filed a claim consisting of two items. The first was for $600 filed as a priority claim covering rent for March and April, 1932, and the second was for $16,025 filed as a general claim for the difference between the rent reserved in the lease and the fair rental value of the premises for the balance of the term. The trustee objected to the claim and sought to have it reduced to $1,000 admittedly owing for past due rent at the time of filing the petition in bankruptcy. The first item having been allowed and paid as a claim entitled to priority, under New Jersey law, the referee reduced the second item to $400.

The covenant before us is like that considered in *Manhattan Prop.* v. *Irving Tr. Co.*, 291 U. S. 320. The difference between the cases is that here the reentry occurred before, while in that case there was no reentry until after, bankruptcy. The petitioner's statement of claim does not follow the covenant in his lease. It is made as if it rested on a covenant providing for damages equal to rents reserved less rental value for the rest of the term, such as that on which the landlord prevailed in *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307. But petitioner's claim must be adjudged on the basis of the covenant that in his interest was inserted in the lease. The only measure available to him is the difference between the rents reserved in the lease and what he might choose or happen to get on reletting. Under the clause in question, it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise under it.

§ 63 (a). *Riggin* v. *Magwire*, 15 Wall. 549. *Dunbar* v. *Dunbar*, 190 U. S. 340, 345. *In re Merrill & Baker*, 186 Fed. 312; cf. *Maynard* v. *Elliott*, 283 U. S. 273, 278. The method here prescribed is not governed by any rule or principle written into or derivable from the lease or recognized in law as governing in such cases as this. Without transgressing the covenant, he may make, terminate and renew leases covering the premises without regard to rental value. He is free to fix or control the amount of lessee's liability, at least to the extent of the difference between free use and reasonable rental value of the premises. It is clear that the specified basis is not a valid one for the proving of claims under § 63.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.